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No. _____

In The

# Supreme Court of the United States

October Term, 1995

BRITTNEY KAYE SETTLE,

*Petitioner,*

v.

DICKSON COUNTY SCHOOL BOARD, *et al.*,

*Respondents.*

**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether public school officials may punish or penalize student expression in individual written work on the basis of the religious viewpoint expressed by the student, consistent with the First Amendment.

2. Whether disputed issues of motivation, intent, or pretext may be resolved on summary judgment, under Fed. R. Civ. P. 56.

## LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1(b), the parties to this proceeding are:

*Petitioner*:

Brittney Kaye Settle, by Next Friend, Jerry Settle

*Respondents*:

The Dickson County School Board; George Caudill, in his official capacity as Superintendent of Dickson County Schools, Reed Evans, in his official capacity as Principal, and Dana Ramsey, in her official capacity.

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**Petition For A Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Sixth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

Petitioner Brittney Settle respectfully petitions for a writ of certiorari to review the judgment and opinion of the U.S. Court of Appeals for the Sixth Circuit. In the alternative, petitioner respectfully asks that a writ of certiorari be granted, the decision below vacated, and the case remanded for reconsideration in light of *Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S.Ct. 2510 (1995).

## OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1-16) is reported at 53 F.3d 152 (6th Cir. 1995). The opinion of the District Court (Pet. App. 19-29) is unreported.

## JURISDICTION

The judgment of the Court of Appeals was entered on May 8, 1995. By order of August 1, 1995, Justice Stevens extended the time for filing a petition to September 25, 1995. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . . .

## STATEMENT OF THE CASE

This case involves the decision of a public school teacher to give a ninth grade student a grade of "zero" on a research paper, because the student chose as her topic "The Life of Jesus Christ." The teacher rejected petitioner Brittney Settle's paper explicitly on the ground that students in public schools may not express their personal religious viewpoints or discuss certain religious figures or themes within the context of individual research assignments, even where students are permitted to write on any other subject of their choice (including other religious or quasi-religious topics). Pet. App. 4, J.A. 42.[1] The Court of Appeals upheld the teacher's conduct on the ground that the teacher's decision "fall[s] within the broad leeway of teachers to determine the nature of the curriculum and the grades to be awarded to students." Pet. App. 8. Petitioner Brittney Settle seeks review of this ruling.[2]

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[1] "J.A." refers to the Joint Appendix in the Court of Appeals.

[2] Brittney Settle has since graduated and is no longer a student in the Dickson County schools. Her claim for damages means that the case is not moot. *Zobrest v. Catalina Foothills School District*, 113 S.Ct. 2462, 2464 n.3 (1993). In addition, Brittney Settle continues to seek injunctive relief in the form of removing the grade of "zero" from her academic record.

1. In March 1991, Dickson County School District teacher Dana Ramsey assigned her ninth grade English students the task of choosing a topic and writing a short research paper. Ms. Ramsey allowed students to write on any topic of their choice. J.A. 35, 37. Ms. Ramsey permitted broad choice in order to give students "ownership in the process" and allow students to choose topics "solely to be more interesting to them." J.A. 37; *see also* J.A. 117. The only limitations were that the student's choice of topic be "researchable," in the sense that students would be required to make use of four (secondary) sources, like books, encyclopedias, magazines, or pamphlets, J.A. 37-38, and "decent," in the sense of being "appropriate" and "something that I would approve of and your parents would approve of." J.A. 38-39. Among the topics selected by the students in the class, and that Ms. Ramsey did not disapprove as outside the parameters of the assignment, were papers on reincarnation (including its relation to Hinduism and Buddhism), J.A. 42, 120-135, witchcraft, black magic and the occult, J.A. 148-157, and spiritualism (ghosts and supernatural encounters with deceased persons). J.A. 136-147. In addition, students wrote papers on such diverse topics as the Pony Express and a jazz singer from the 1920s and 1930s. J.A. 44-47.

Ms. Ramsey posted a sign-up sheet on which students could list the topics they had chosen. Between Friday, March 15 and Friday, March 22, 1991, students could sign up and change their topics at will. Students were permitted to change their paper topics after that date, but were expected to notify Ms. Ramsey promptly of any proposed topic change, so that students would not change paper topics too far along in the research process and so that there was no duplication of paper topics. J.A. 35, 43-44. Draft outlines for the research papers were due on the Tuesday following the sign-up period (March 26). J.A. 39.

Petitioner Brittney Settle initially signed up to write a paper on "Drama." During the weekend after the initial sign-up period, she decided that that topic was too broad and not

sufficiently interesting to her. She decided to change her paper topic to "The Life of Jesus Christ" and prepared an outline for the Tuesday deadline. She did not discuss the change with Ms. Ramsey until Tuesday, when she handed in her outline. Ms. Ramsey refused to accept Brittney's outline, telling Brittney that the topic was "not an appropriate thing to do in a public school" (J.A. 57) because of its religious nature and because it related to Brittney's "personal religious beliefs." J.A. 57. As Ms. Ramsey explained in deposition testimony (J.A. 57):

> A. . . . And I just knew that we don't deal with personal religion – personal religious beliefs. It's just not an appropriate thing to do in a public school, and I tried to explain that to her [Brittney].
>
> Q. And how did you come up with that conclusion?
>
> A. Well, people don't send their children to school for a teacher to get in a dialogue with personal religious beliefs. They send them to learn to read and write and think. And you can do that without getting into personal religion.

Ms. Ramsey told Brittney that she was free to write on a topic other than Drama (J.A. 68) – even one with some "religion aspect" (J.A. 77, 103) – but that she must not choose a topic involving the person of Jesus Christ, or any modification of that topic. J.A. 77, 82-83. Ms. Ramsey did not disapprove Brittney's topic on the ground that it failed to satisfy the criteria announced for the assignment – that a topic be interesting, researchable and "decent." J.A. 69. Nor did Ms. Ramsey disapprove the topic because it involved a change from Brittney's earlier proposed topic. J.A. 68, 77. Instead, Ms. Ramsey told Brittney that her topic "was inappropriate because . . . it was dealing with her personal religion, her personal Savior" (J.A. 52) and that this "could lead to a bad experience" (J.A. 53) because of the topic's close relationship to Brittney's religious views and the prospect that Brittney

might express her own personal religious views in the course of writing about "The Life of Jesus Christ." J.A. 52-57.[3]

Brittney's father, Jerry Settle, met with Ms. Ramsey and with the school principal, Mr. Evans, in an attempt to reach an understanding. Mr. Settle at one point proposed a compromise topic on the "psychological and scientific aspects of Jesus Christ," in order to address Ms. Ramsey's stated concerns that the topic was too religious and did not involve objective or verifiable matters. Ms. Ramsey and Mr. Evans rejected this alternative on the ground that "it was a play on words." J.A. 83. Ms. Ramsey subsequently testified that she would not have permitted Brittney to write a paper on the life of Jesus Christ or any modification thereof (J.A. 83), because that

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[3] Subsequently, in statements to the School Board and at her deposition, Ms. Ramsey offered additional reasons for her decision, including that Brittney had not complied with procedures for changing the topic. J.A. 56. However, Ms. Ramsey also stated that she would have permitted Brittney to change topics, after the initial deadline, so long as Brittney did not write about Jesus Christ. J.A. 77. At all times, Ms. Ramsey reaffirmed that the assumed religious nature and viewpoint of Brittney's proposed paper was a sufficient reason for her action, and that she would have rejected the paper on that ground even if it had been Brittney's original topic:

> *Board Member #7* I have one question. I asked this question of Mrs. Ramsey, in all due honesty and respect for your teaching ability and my knowledge of you, but let me, you got to clear this up in my mind. The problem that I see is the change in the subject matter. The fact that she changed her subject matter of the paper and did not come for a conference with you to change the subject matter. Had the paper on this subject been the original choice, would you have accepted it?
>
> *Mrs. Ramsey* No, I wouldn't. Just as I wouldn't have accepted one on Buddha or Muhammed. The papers that seemed to be causing so much problem are on religious issues and I was presented a religious paper.

J.A. 231-231a (Transcript of School Board meeting). *Accord* J.A. 67 (deposition testimony). Ms. Ramsey testified that she did not consider the papers on reincarnation, spiritualism and the occult to address religious topics. J.A. 62-67, 75-82, 88-99.

would be "dealing specifically with her personal redeemer." J.A. 77.

At the time papers were due, Brittney turned in her paper on "The Life of Jesus Christ." Ms. Ramsey assigned Brittney a grade of "zero" without reading the paper. The school principal and the school board supported Ms. Ramsey's decision. J.A. 164-179, 186, 220-231a.[4]

2. Petitioner filed this suit for declaratory and injunctive relief, and compensatory damages, pursuant to 42 U.S.C. § 1983. The district court granted respondents' motion for summary judgment. The district court believed that this Court's cases set forth "two methods of analysis when dealing with student speech in public schools." Pet. App. 22. The first, established in *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969), "deals with the prohibition of a student's individual, personal expression while on school premises" and the second, established in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), "deals with the limits of a school official's authority over student expression that is school sponsored." Pet. App. 22. The court thought *Kuhlmeier* the more applicable precedent, because Brittney Settle's paper occurred within an instructional setting. Pet. App. 25. The court held that "[t]his case does not present an issue of personal expression" but of the school's control over the curriculum. Pet. App. 25. The court deemed the issue to be "whether the First Amendment requires a school affirmatively to promote particular student speech." Pet. App. 25 (quoting *Kuhlmeier*, 484 U.S. at 270).

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[4] The Dickson County School District had a written policy permitting student religious expression in compositions: "Student-initiated expressions to questions or assignments which reflect their beliefs or non-beliefs about a religious theme shall be accommodated. For example, students are free to express religious belief or non-belief in compositions, art forms, music, speech and debate." J.A. 158. The school district claims that it did not violate this policy because Brittney Settle's paper was not a "composition." Pet. App. 28.

The district court found the school district's actions "reasonably related to pedagogical concerns," within the meaning of *Kuhlmeier*. Pet. App. 25-26. The court noted that Ms. Ramsey "did accept outlines on topics such as reincarnation, spiritualism, and the occult, which discussed religious figures from history and their doctrinal teachings." Pet. App. 21 n.1. The court believed, however, that these papers "did not focus on religion" because specific religions were mentioned only to illustrate belief in reincarnation or spiritualism, and were not themselves the topic. Pet. App. 21 n.1.[5] The court stated that Ms. Ramsey was justifiably "fearful" that Brittney Settle's proposed paper about Jesus might reflect Brittney's "personal religious beliefs," making teacher criticism a more sensitive issue. Pet. App. 26.

The court also stated that Brittney Settle had not conformed to Ms. Ramsey's deadlines and her topic "could have been rejected on that ground alone." Pet. App. 25-26. However, the court conceded that Ms. Ramsey had rejected Brittney's paper for both that reason and because of its religious overtones. Pet. App. 26 n.3. The district court did not apply the "mixed motive" analysis of *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977), or make any finding that Ms. Ramsey would have rejected the paper even had she not feared its particular religious nature. Rather, the court dismissed the case on summary judgment.

3. The Court of Appeals for the Sixth Circuit affirmed. Pet. App. 1-16. The Court acknowledged that "teachers should not punish or reward people on the basis of inadmissible factors – race, religion, gender, political ideology" but held that "teachers, like judges, must daily decide which

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[5] The court noted: "For example, a paper on reincarnation discussed Buddhism and Hinduism; a paper entitled 'Spiritualism' noted that some religions make it a part of their beliefs; and the composition on 'Magic Throughout History' contained such titles as 'Jews believe in Baal,' 'Demons Are Evil Spirits,' and 'Gods are Good Spirits.' " Pet. App. 21 n.1.

arguments are relevant." Pet. App. 7. "So long as the teacher violates no positive law or school policy, the teacher has broad authority to base her grades for students on her view of the merits of the students' work." Pet. App. 6. Applying this premise, the Sixth Circuit concluded that "[i]t is not for us to overrule the teacher's view that the student should learn to write research papers by beginning with a topic other than her own theology." Pet. App. 8. The court held that "[a]ll six of Ms. Ramsey's stated reasons for refusing to allow Brittney to write the paper" – including the reason that students may not express religious viewpoints in school written work – "fall within the broad leeway of teachers to determine the nature of the curriculum and the grades to be awarded to students, even the reasons that may be mistaken." Pet. App. 7-8.[6]

Judge Batchelder "disagree[d] with both the majority's discussion of the facts and its analysis of the law," Pet. App. 9, but nonetheless concurred in the judgment on the ground that "the facts stated simply do not state a constitutional claim" because the teacher did not "engage in restricting Brittney's expression" but only "her choice of topic for a research paper." Pet. App. 11.

4. On August 1, 1995, Justice Stevens granted petitioner's application to extend the time in which to file a petition for certiorari in this Court to and including September 25, 1995. Pet. App. 33.

## REASONS FOR GRANTING THE WRIT

This case is about viewpoint discrimination. Specifically, this case presents the question of whether public school officials may censor or punish individual student expression in classroom discussions and written assignments on the basis of its particular religious viewpoint. The decision below upholds viewpoint-based censorship of student expression involving particular religious traditions and viewpoints on the theory

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[6] *See infra* at 26-27 n.14 (discussing other explanations put forward by school officials).

that such censorship lies within the discretion of school officials, under this Court's decision in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).

The decision below presents an important, unresolved, and disturbingly recurrent issue of First Amendment law concerning freedom of speech, freedom of religion, and public education. The Sixth Circuit's decision conflicts in principle with this Court's cases forbidding viewpoint discrimination against particular speakers or messages, even in "nonpublic" fora, and even within categories of expression that government could prohibit entirely.[7] The decision also creates a direct conflict among circuits of the U.S. Court of Appeals on the question of viewpoint-based restriction of speech in the public school context.[8]

The decision below rests on an extremely tendentious reading of *Kuhlmeier* as uniquely authorizing such viewpoint discrimination in the school context – a reading not supported by that case and that conflicts with this Court's other decisions concerning student rights to expression in the classroom. *Cf. Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969). The opinion below threatens to exacerbate the confusion and division of lower courts over these issues.

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[7] *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S.Ct. 2141 (1993); *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538 (1992). *See also Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S.Ct. 2510 (1995).

[8] *Hedges v. Wauconda Community School Dist.*, 9 F.3d 1295, 1297-98 (7th Cir. 1993) (viewpoint discrimination against student expression of religious views impermissible even in "nonpublic" forum at junior high school); *Good News/Good Sports Club v. School District of Ladue*, 28 F.3d 1501 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 2640 (1995) (school officials may not exclude junior high student group from school's nonpublic forum on basis of religious viewpoint); *Searcy v. Harris*, 888 F.2d 1314, 1324-25 (11th Cir. 1989) (school officials may not exclude speakers from school-sponsored Career Day program on basis of the speakers' viewpoint).

Finally, the question presented is one of national significance, affecting the practices of literally every public school district in the nation and involving the rights of public school students – and their parents – in every one of those districts. The issues presented by this case have been the subject of recent congressional hearings considering language to amend the Constitution, due to concerns that school authorities (and courts) too often misinterpret the First Amendment as if it authorized or required discrimination against student religious viewpoints in the public schools. President Clinton delivered a major address on this subject on July 12, 1995, and the Department of Education, on August 10, 1995, issued a detailed guidance letter addressing this issue to every public school superintendent in the nation. This case provides an appropriate and needed occasion for this Court to protect the right of students to discuss religious viewpoints in appropriate classroom contexts, and to resolve the confusion that has plagued lower courts and school districts throughout the nation on this issue.

## I. THE DECISION BELOW PRESENTS A RECURRING AND UNRESOLVED FIRST AMENDMENT ISSUE OF NATIONWIDE IMPORTANCE ON WHICH LOWER COURTS ARE DIVIDED AND CONFUSED.

The issue presented by this case is whether school officials may engage in viewpoint-based restriction or censorship of individual student religious expression that occurs in a curricular context. Petitioner Brittney Settle, a ninth grade student in the Dickson County School District, sought to write an individual research paper on "The Life of Jesus Christ" in fulfillment of a class research assignment. The instructor allowed students to write on topics of their own choosing, including papers on other religious and quasi-religious themes (reincarnation, spiritualism, the occult, black magic) as well as a wide range of other topics. However, the instructor prohibited Brittney Settle from researching and writing about

"The Life of Jesus Christ" *because of the particular religious viewpoint the instructor considered the topic to present and because the instructor thought the choice of topic reflected Brittney Settle's personal religious views and interests.* J.A. 52-57, 77, 83-84. The instructor encouraged students to choose topics of personal interest to them (J.A. 37, 117), rejected no other proposed topic, and stated that she would have permitted Brittney Settle to write on some other topic, even one involving other religious themes – so long as the paper did not involve Jesus Christ. J.A. 68, 77. As it comes to this Court, this is a straightforward case of viewpoint discrimination.

It is important to emphasize what is *not* at issue in this case. Students have no free speech right to dictate the content of a public school's curriculum and petitioner does not contend otherwise. Nor do students have a general constitutional right to object to a teacher's (or school's) control over the content and manner of classroom instruction or discussions, including the subjects chosen and, very often, even the viewpoints expressed by students. Teachers and school districts properly are granted substantial latitude on such matters. Moreover, even where a school district (or its teacher) has chosen to allow students to write research papers or essays, or make classroom presentations, on subjects of a student's choosing, the school or teacher may impose limitations on the students' choices for reasons of age-appropriateness, decency, relevance, degree-of-difficulty, lack of originality, duplication of other students' efforts or previous classwork, or any other valid educational reason. *This case challenges none of these principles.*

However, where a school has made the *instructional choice* to permit students to make classroom presentations or write individual papers on topics of the students' own choice, including religious or quasi-religious topics, a school may not punish or penalize a student's choice of a topic *because of the religious viewpoint chosen or expressed by the student*, unless the manner of its presentation offends school standards of

decency, or its context suggests that it will be perceived as representing the views of the school itself. *Kuhlmeier*, 484 U.S. at 271-72.

The decision below, upholding such discrimination, is contrary to this Court's cases forbidding viewpoint discrimination in other contexts and is in direct conflict with the decisions of other federal circuits.

### A. The Decision Below Conflicts in Principle with Decisions of this Court Forbidding Viewpoint Discrimination even in "Nonpublic" Fora and within Categories of Speech that Government Could Prohibit Entirely.

It is well established that, even in a "nonpublic" forum, where government may restrict the subjects on which speech is permitted, government regulation of expression must be viewpoint neutral. *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788, 806 (1985). Similarly, even within categories of wholly *unprotected* expression, government may not discriminate on account of a speaker's viewpoint. *R.A.V. v. St. Paul*, 112 S.Ct. 2538, 2643-45 (1992). Thus, even where a public school forum has been assumed to be "nonpublic," this Court has unanimously held that school officials may not exclude discussion of otherwise permitted topics on account of the speaker's religious viewpoint. *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S.Ct. 2141, 2148 (1993). *See also Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S. Ct. 2510, 2517 (1995) (state university may not "select[] for disfavored treatment those student journalistic efforts with religious editorial viewpoints.").

The premise of both lower courts in this case was that, under this Court's decision in *Kuhlmeier*, once student expression is characterized as occurring in a curricular context, it is essentially unprotected by the First Amendment. As we discuss presently, this reading of *Kuhlmeier* creates a severe tension among this Court's cases dealing specifically

with students' rights of expression in public schools. *See infra* at 19-21. But even indulging the lower courts' premise, it simply does not follow that school officials may engage in viewpoint-based discrimination against particular student views. Such a holding is flatly inconsistent with *R.A.V.*, *Lamb's Chapel*, and *Rosenberger*. Even if school officials need not have permitted expression of *any* student views in the first place or could have imposed *viewpoint-neutral* subject matter restrictions on what topics students could address, it does not follow that schools may prohibit the expression of particular views or prohibit student expression on particular topics because of the religious viewpoint that such a topic is thought to entail.

Yet that is exactly what happened in this case. The Sixth Circuit held that a public school teacher may forbid a student from writing an individual research paper about the life of Jesus Christ, based on the teacher's perception of the particular religious viewpoint that such a paper would necessarily advance and because of its assumed congruence with the student's own religious views. The teacher permitted students to write papers on other religious topics and implicating other world religions and explicitly encouraged students to choose topics of personal interest to them. The teacher censored Brittney Settle's paper topic on the basis of her opinion that Brittney's personal religious views as a Christian made it inappropriate for her to write on that topic, because "I just knew that we don't deal with personal religion – personal religious beliefs. It's just not an appropriate thing to do in a public school." J.A. 57.

Brittney Settle would have been permitted to write a paper on reincarnation, occult practices, supernatural conversations with the dead, or any of a number of other topics. She would have been permitted to write on any other topic of personal interest to her. But she could not choose a topic that (in the teacher's perception) reflected an interest resulting from her own personal religious beliefs as a Christian or that reflected a Christian viewpoint. That is a viewpoint-based

restriction. The court below thought such discrimination to lie within a teacher's discretion. That holding conflicts in principle with *R.A.V.*, *Lamb's Chapel*, and *Rosenberger*, and merits this Court's review.[9]

### B. The Decision Below Conflicts with Decisions of Other Federal Appellate Courts Concerning Viewpoint-based Restriction of Speech in the Public School Context.

The decision of the Sixth Circuit conflicts with the decisions of the Seventh, Eighth, Ninth, and Eleventh circuits of the U.S. Court of Appeals on the question of whether the First Amendment permits viewpoint-based discrimination against expression of particular views in public schools or in school-

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[9] The fact that the instructor and school district subsequently gave additional reasons for rejecting Brittney Settle's paper does not erase the problem of viewpoint-based discrimination, for two reasons. First, if a substantial part of the reason why the instructor rejected Brittney Settle's paper was unconstitutional viewpoint discrimination, then it was incumbent on the lower courts, under *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977), to determine whether the instructor would have rejected the proposed paper topic absent the constitutionally illegitimate reason – a factual question never addressed by the lower courts. The instructor at all times in this litigation maintained that the religious nature and viewpoint of Brittney Settle's proposed topic was the primary and sufficient basis for her decision to reject that topic (J.A. 67, 231-231a) and the Sixth Circuit upheld "[a]ll six of Ms. Ramsey's stated reasons" as permissible. Pet. App. at 7-8. If this holding is erroneous, summary judgment for the school district was improper under *Mt. Healthy*, regardless of whether some of the instructor's other stated reasons would be constitutionally legitimate, standing alone.

Second, some of the additional reasons put forth by the school district are variations of viewpoint discrimination, others are plainly pretextual, and others are at least arguably so. As we discuss below, summary judgment is inappropriate on such disputed questions of pretext or motive, and the decision below conflicts with that of other circuits on this score. *See infra* at 25-29.

sponsored publications. This Court's review is warranted to resolve this conflict.

The decision below directly conflicts with the Seventh Circuit's analysis in *Hedges v. Wauconda Community School District*, 9 F.3d 1295 (7th Cir. 1993). In *Hedges*, the Seventh Circuit struck down two school district policies that forbade any student distribution of written material of a religious nature on junior high or elementary school grounds. The Seventh Circuit held that, *irrespective of the nature of the forum as "public," "limited public" or "nonpublic,"* school officials may not discriminate against student expression on the basis of its viewpoint, and especially not on the basis of religious viewpoint. The court's opinion merits quotation at some length:

> Schools may not prohibit their pupils from expressing ideas. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). And no arm of government may discriminate against religious speech when speech on other subjects is permitted in the same place at the same time. *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S.Ct. 2141, 2148 (1993); *Doe v. Small*, 964 F.2d 611 (7th Cir. 1992) (in banc). See Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw.U.L.Rev. 1, 48 (1986). The first amendment's ban on discriminating against religious speech does not depend on whether the school is a "public forum" and, if so, what kind (subjects to which we return). *May v. Evansville-Vanderburgh School Corp.*, 787 F.2d 1105, 1114 (7th Cir. 1986). Even when the government may forbid a category of speech outright, it may not discriminate on account of the speaker's viewpoint. *R.A.V. v. St. Paul*, 112 S.Ct. 2538, 2543-45 (1992). Especially not on account of a religious subject

> matter, which the free exercise clause of the first amendment singles out for protection.

9 F.3d at 1297-98 (Easterbrook, J.)

*Hedges* holds that viewpoint-based restriction of student speech is impermissible even where student speech could, if school officials chose, be banned outright or severely restricted. Here, Brittney Settle's teacher explicitly permitted student expression of individual viewpoints and interests within the context of the research paper assignment. (In the teacher's words, "I was trying to give them ownership in the project." J.A. 117.) Even granting that this context is a "nonpublic" forum in which the teacher could have restricted the subjects on which students were permitted to write, the teacher could not, consistent with *Hedges*, exclude a particular topic "on account of the speaker's religious viewpoint" or "on account of a religious subject matter." 9 F.3d at 1298.

The decision below is also inconsistent with the Eighth Circuit's recent decision in *Good News/Good Sports Club v. School District of Ladue*, 28 F.3d 1501 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 2640 (1995). The Eighth Circuit found impermissible viewpoint discrimination in a junior high school's exclusion of a religious club from what it assumed, *arguendo*, to be a *nonpublic* forum – school facilities between 3 and 6 P.M. on school days, which the school had reserved for meetings of Scout groups because of the school's long-standing relationship with and support of such groups. The Eighth Circuit found that this arrangement amounted to permitting access to some groups to express viewpoints on moral and character development but not to a religious group wishing to address " 'an otherwise includible subject' " (28 F.3d at 1505 (quoting *Cornelius*, 473 U.S. at 806)) from a religious standpoint or perspective. 28 F.3d at 1506-07.

*Good News/Good Sports* involved after-hours access to facilities, rather than student expression within the context of a curricular assignment, but the principle is the same: school officials may limit the *subject matters* of speech or expressive activities that occur in a school's nonpublic forum; but they

may not forbid discussion of an otherwise includible subject on the basis of the speaker's religious point-of-view or perspective on such subject. The Sixth Circuit's opinion holds that a teacher's fears about a student's point-of-view on an otherwise permissible subject – religion, religious figures, and quasi-religious beliefs – authorize censorship of that student's discussion of the subject. That decision is in conflict with *Good News/Good Sports*.

Several circuits have addressed the same general issue in cases involving school officials' viewpoint discrimination on some basis other than religious viewpoint. All have held such viewpoint discrimination impermissible, *even within school-sponsored curricular activities or in school-sponsored publications*. The Sixth Circuit's holding that *Kuhlmeier* places such matters within the discretion of school officials is implicitly or explicitly rejected by each of these cases, creating a square conflict among the circuits. *See San Diego Committee Against Registration and the Draft v. Governing Board*, 790 F.2d 1471 (9th Cir. 1986) ("*CARD*") (viewpoint discrimination by school officials impermissible even if school newspaper advertising section is a "nonpublic" forum in which content or subject matter restrictions are permissible);[10] *Searcy v. Crim*, 815 F.2d 1389, 1393-94 (11th Cir.

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[10] In *CARD*, the Ninth Circuit held that a public school newspaper's advertising section was a "limited public forum" from which school officials could not exclude advertising by a group opposed to military draft registration. The court further held that, assuming that the advertising section was a "nonpublic" forum, exclusion of the anti-draft group's proposed advertisement nonetheless violated the First Amendment because school officials permitted military recruiters to place advertisements in the paper. Such different treatment constituted forbidden viewpoint-based discrimination. In *Planned Parenthood v. Clark County School District*, 941 F.2d 817 (9th Cir. 1991) (en banc), the Ninth Circuit held that the first holding in *CARD* did not survive this Court's decision in *Kuhlmeier*, but that the alternative holding remained valid: "We do not disturb the CARD majority's alternative holding that, assuming the school publications were nonpublic forums, the school engaged in impermissible viewpoint

1987) (school district policy barring "peace activists" from presenting career opportunities information on bulletin boards, in guidance offices, and at school career days, when military recruiters were permitted access to address the same subject, violated the First Amendment, even assuming that the fora in question were nonpublic); *accord Searcy v. Harris*, 888 F.2d 1314, 1319, 1324-25 (11th Cir. 1989) (*Kuhlmeier* does not change the applicable standard; school officials may not exclude speech at school-sponsored Career Day and Youth Motivation Day on basis of speakers' viewpoint).

The Eleventh Circuit's two decisions in *Searcy* present an especially clear conflict with the Sixth Circuit's decision. In *Searcy v. Harris*, the school district argued that *Kuhlmeier* permitted it to engage in viewpoint-based discrimination in granting access to outside organizations to a Career Day and Youth Motivation Day, because those programs were school-sponsored and part of the school's instructional program. 888 F.2d at 1319, 1324. The Eleventh Circuit explicitly rejected such a claim:

> The Board argues that *Hazelwood [School District v. Kuhlmeier]* does not prohibit school officials from engaging in viewpoint based discrimination. We disagree. *Hazelwood* involved a content based distinction; the principal decided that the subject of teenage sexuality was inappropriate for some of the younger students. . . . There was no indication that the principal was motivated by disagreement with the views expressed in the articles. Although *Hazelwood* provides reasons for allowing a school official to discriminate based on *content*, we do not believe it offers any justification for allowing educators to discriminate based on viewpoint. The prohibition against viewpoint discrimination is firmly embedded in first amendment analysis. . . . Without more

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discrimination in accepting advertisements advocating military service but refusing CARD's advertisement offering an opposing point of view." 941 F.2d at 828 n.19. (Rymer, J.)

> explicit direction, we will continue to require school officials to make decisions relating to speech which are viewpoint neutral.

*Searcy v. Harris*, 888 F.2d at 1324-25. This analysis is flatly inconsistent with the Sixth Circuit's analysis in this case. The Eleventh Circuit in *Searcy* held that *Kuhlmeier* does not authorize viewpoint discrimination by school officials. The Sixth Circuit here held that *Kuhlmeier* gives school officials plenary discretion to restrict or prohibit student expression that occurs in a curricular context, even where such discretion is employed to restrict student expression based on its presumed viewpoint. This Court's review is necessary to resolve the conflict between circuits on this issue.

### C. The Decision Below Rests on a Questionable Reading of *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) that Contradicts this Court's Other Precedents Concerning Student Rights to Express Personal Viewpoints in Public Schools.

Both lower courts thought that the teacher's conduct in this case was justified by this Court's decision in *Kuhlmeier*. This reading of *Kuhlmeier* creates a severe tension with – if not outright contradiction of – *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969), a decision reaffirmed in *Kuhlmeier*. While we submit that the Sixth Circuit's reading is erroneous, *Kuhlmeier* is somewhat ambiguous about whether *Tinker* remains applicable to student expression in the classroom context. This Court's review is needed to clarify the confusion in lower courts over the relationship between *Kuhlmeier* and *Tinker* on the issue of student expression in classroom discussions, written assignments, and oral presentations.

The better reading of *Kuhlmeier*, we submit, is that school officials may make content-based decisions concerning curricular matters and may restrict student expression in the curricular context on the basis of subject matter (including

such concerns as decency and age-appropriateness), germaneness to the educational objective, style and quality, and the likelihood that student expression will be attributed to the school. *Kuhlmeier*, 484 U.S. at 271. On such matters, a school's restriction need only be "reasonably related to legitimate pedagogical concerns." *Id.* at 273. *Kuhlmeier* also holds, more specifically, that *Tinker* is inapposite to the question of when "a school may refuse to lend its name and resources" to student expression disseminated under school auspices. *Id.* at 272-73.

*Kuhlmeier* does not hold, however, that *Tinker* is totally inapplicable in the classroom context. To the contrary, *Kuhlmeier* reaffirms that students "cannot be punished merely for expressing their personal views on school premises" unless school authorities "have reason to believe that such expression will 'substantially interfere with the work of the school or impinge upon the rights of other students.' " 484 U.S. at 266 (quoting *Tinker*). The expression in *Tinker* itself (the wearing of a symbolic black armband) took place in the classroom. Furthermore, the Court in *Tinker* was especially concerned about discrimination *among* student viewpoints. 393 U.S. at 510. Nothing in *Kuhlmeier* impairs these holdings.

We think that the most natural reading of *Kuhlmeier* and *Tinker*, taken together, is that school officials may not engage in *content*-based censorship of student speech on school premises "in the cafeteria, or on the playing field, or on the campus during the authorized hours" (*Kuhlmeier*, 484 U.S. at 266 (*quoting Tinker*, 393 U.S. at 512-13)); and that school officials may not engage in *viewpoint*-based censorship of student speech in a curricular context, absent compelling justification, but may restrict the subject matter and content of student expression in such a context, as well as its manner, in any way "reasonably related to legitimate pedagogical concerns." This is a consistent and sensible standard that does not involve federal courts in school curriculum decisions or intrude on a teacher's authority over the content and manner

of instruction, including classroom discussions and written assignments.

The Sixth Circuit's approach, however, misreads *Kuhlmeier* and eviscerates *Tinker*. The decision below authorizes viewpoint discrimination permitted in no other First Amendment context. As noted above, even within categories of *unprotected* expression, government must be viewpoint-neutral. But student expression in academic contexts is *not* unprotected. *Tinker* holds – and *Kuhlmeier* expressly reaffirms – that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506; *accord Kuhlmeier*, 484 U.S. at 266. The Sixth Circuit decision places student speech rights below those of any other category, contrary to both *Tinker* and *Hazelwood*. In so doing, the decision below sows great constitutional mischief, exacerbating existing confusion and division in the lower courts.[11]

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[11] The approach of the Sixth Circuit in this case is, unfortunately, not aberrational. In several reported cases, school districts have suppressed student expression of religious viewpoints in classroom discussions or written work because of its religious nature, with courts *upholding* such viewpoint-based restrictions on the authority of *Kuhlmeier*. *See DeNooyer v. Livonia Public Schools*, 799 F.Supp. 744, 749 (E.D. Mich. 1992), *aff'd without published opinion* 1 F.3d 1240, 12 F.3d 211 (6th Cir. 1993), *cert. denied*, 114 S.Ct. 1540 (1994) (second grade student forbidden from making show-and-tell presentation about her participation in church choir by showing a video of the choir; upheld on authority of *Kuhlmeier*); *Duran v. Nitsche*, 780 F.Supp. 1048, 1052-55 (E.D. Pa. 1991), *vacated and appeal dismissed*, 972 F.2d 1331 (3d Cir. 1992) (student forbidden from making classroom oral report on "The Power of God" in fulfillment of assignment to prepare a presentation on some variation on "The Power of ___"; upheld on authority of *Kuhlmeier*); *Guidry v. Calcasieu Parish School Bd.*, 9 Relig. Freedom Rptr. 118 (E.D. La. 1989), *aff'd on jurisdictional grounds sub nom. Guidry v. Broussard*, 897 F.2d 181 (5th Cir. 1990) (high school class valedictorian forbidden from speaking at commencement because of her expressed intention to mention her personal religious beliefs in her commencement address).

### D. The Decision Below Presents a Recurring Issue of National Importance.

The question of public school students' rights to express personal religious viewpoints in appropriate classroom contexts, including in oral presentations and in individual written assignments, is an issue of nation-wide significance and concern. The decision below has been part of an important national discussion of whether it is necessary to amend the Constitution itself in order to end the recurrent problem of discrimination against student religious expression. This past summer, Congress held hearings on this problem as the first step in considering whether a constitutional amendment is necessary to redress the systemic problem of government discrimination against religious viewpoints and religious persons in the administration of public schools and other government programs. *See generally Religious Liberty and the Bill of Rights*, Hearings Before the Subcommittee on the Constitution, Committee on the Judiciary, U.S. House of Representatives (June 8, 1995).

The instant case was discussed by several of the leading witnesses at these hearings as a prime example of the pervasive problem of discrimination against – indeed, bigotry toward – the expression of religious viewpoints in public school classrooms. Professor Douglas Laycock of the University of Texas cited the Sixth Circuit's decision in this case as an illustration of the problem of "discrimination against religious speech aris[ing] from judicial deference to bureaucratic rationalizations." Statement of Douglas Laycock submitted to the Subcommittee on the Constitution of the House Committee on the Judiciary (June 14, 1995) at 6-7; *see also id.* at 2 (citing the problem of "judicial deference to the rationalizations of government employees who discriminate against religion."). Professor Laycock testified that the teacher's actions in the instant case "discriminated, not just between the religious and the secular, but between Christianity and spiritualism, between Christianity and magic religions such as voodoo, and between Christianity and religions that believe in

reincarnation, such as Hinduism." He characterized the instant case as an example of the type of "egregious abuses" of constitutional rights of equal religious expression that courts sometimes fail to correct. *Id.* at 6.

Professor Michael McConnell of the University of Chicago Law School criticized the decision below as a denial of equal rights of expression due to a teacher's "uninformed, bigoted, and selectively applied" religious stereotypes. He stated that he had "little doubt that the case would have come out the other way if a racist teacher had forbidden a paper on Martin Luther King, Jr., or an anti-communist teacher had forbidden a paper on the evils of capitalism." Testimony of Michael W. McConnell before the Subcommittee on the Constitution of the House Judiciary Committee (June 7, 1995) at 8-9.[12]

On July 12, 1995, President Clinton addressed the same set of issues in a major policy speech:

> The First Amendment does not – I will say again – does not convert our schools into religion-free zones. . . . The First Amendment does not require students to leave their religion at the schoolhouse gate. We wouldn't want students to leave the values they learn from religion . . . behind at the

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[12] Professor McConnell also testified that the problem of discrimination against religious expression was widespread, and that the cases he discussed were examples only: "[T]he Committee should be aware that only a small fraction of cases can be litigated; these are only the tip of the iceberg." *Id.* at 7.

Professor Laycock and Professor McConnell agreed that the problem of discrimination against religious speech and religious views is serious and widespread, but disagreed over whether the problem is one that warrants further action by Congress (McConnell) or that ought to be solved within the framework of existing law (Laycock). One of the attorneys for petitioner in this case also testified that the problem of discrimination against religious expression is pervasive. Testimony of Professor Michael Stokes Paulsen before the Committee on the Judiciary of the U.S. House of Representatives (June 8, 1995).

> schoolhouse door, and reinforcing those values is an important part of every school's mission.
>
> Some school officials and teachers and parents believe that the Constitution forbids any religious expression at all in public schools. That is wrong. . . . *Students should feel free to express their religion and their beliefs in homework, through art work, during class presentations, as long as it is relevant to the assignment.* . . . All these forms of religious expression and worship are permitted and protected by the First Amendment.

Remarks by the President on Religious Liberty in America (The White House, Office of the Press Secretary, July 12, 1995) at 6, 7, 8 (emphasis added).

On August 10, 1995, the Secretary of Education, pursuant to the President's directive, addressed a "guidance letter" to the nation's school superintendents that contains the following paragraph:

> *Student assignments:* Students may express their beliefs about religion in the form of homework, artwork, and other written and oral assignments free of discrimination based on the religious content of their submissions. Such home and classroom work should be judged by ordinary academic standards of substance and relevance, and against other legitimate pedagogical concerns identified by the school.

The decision below is contrary to the administration's Guidance Letter. Indeed, the specific paragraph appears motivated by the Sixth Circuit's decision in this case and congressional testimony criticizing that decision.[13]

The actions of Congress and the Administration signal that the issues raised by this case and others like it are ones of

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[13] In light of the Secretary of Education's Guidance Letter, this Court may wish to solicit the views of the Solicitor General as to the interest and position of the United States with respect to this petition.

broad national concern. We urge this Court to review this issue of profound national concern, on which lower courts and school officials are divided and badly confused.

## II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER FEDERAL CIRCUITS CONCERNING THE PROPRIETY OF GRANTING SUMMARY JUDGMENT ON DISPUTED QUESTIONS OF MOTIVATION, INTENT, OR PRETEXT.

The Sixth Circuit's decision affirming the grant of summary judgment for respondent school district presents an additional conflict with the decisions of several other circuits on the question of whether disputed issues of pretext and mixed motivation may be resolved on summary judgment. *Church of Scientology v. City of Clearwater*, 2 F.3d 1514, 1530-34 (11th Cir. 1993), *cert. denied*, 115 S.Ct. 54 (1994) (genuinely disputed factual issue of pretext or motive on the part of government officials may not be resolved on motion for summary judgment); *Brown v. Polk County*, 61 F.3d 650 (8th Cir. 1995) (*en banc*) (finding sufficient evidence of religiously discriminatory motivation on the part of government officials to preclude judgment for government, and directing judgment for plaintiff); *Gallo v. Prudential Residential Services*, 22 F.3d 1219 (2d Cir. 1994) (summary judgment ordinarily inappropriate on questions of motivation and pretext).

It is settled law that, on a motion for summary judgment, the facts must be construed in the light most favorable to the nonmoving party, with all justifiable inferences drawn in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). In this case, it is clear that a substantial – if not the predominant – factor in the teacher's decision to censor Brittney Settle's chosen topic was its presumed religious nature and Brittney Settle's presumed religious viewpoint. Assuming that this reason violates the First Amendment, it was incumbent on the school district to demonstrate that the other

reasons subsequently given by the teacher for her action would have caused her to reject the proposed topic even absent the improper viewpoint-based motivation. *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977). In addition, the facts give rise to a permissible inference that the other reasons subsequently offered by the teacher were pretexts to disguise a decision made on the basis of religious viewpoint. These are disputed issues of fact. The record, construed most favorably to Brittney Settle, certainly supports the inference that the teacher would not have censored Brittney Settle's paper but for the religious viewpoint she thought it to represent, and/or that the teacher's later explanations were pretextual post hoc rationalizations.[14]

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[14] At no time did the teacher retreat from her initial explanation that (as she stated before the school board) "[w]e are taught, the law says we are not to deal with religious issues in the classroom," J.A. 222 and (as she stated in her deposition) that student expression of "personal religious beliefs . . . [is] not an appropriate thing to do in a public school." J.A. 57.

The Sixth Circuit identified *six* different reasons offered by the teacher, at various times, and held that all six justified the teacher's actions. Pet App. 7-8. All of these are at least arguably pretextual, some of them, we submit, plainly so: First, the teacher "stated that the student had failed to receive permission to write on the topic prior to handing in the outline." Pet. App. 3. But the teacher stated both before the school board and in her deposition that she would have refused to permit Brittney to write on this paper in any event, even if it were the one Brittney had signed up for in the first instance, J.A. 67, 231-231a, and would have allowed Brittney to switch to any other topic. J.A. 68.

Second, the teacher "believed it would be difficult for her to evaluate a research paper on a topic related to Jesus Christ," because criticism of style and form might be perceived as criticism of Brittney's Christian faith. Pet. App. 3. Such a view of Christian students' ability objectively to discuss religious topics or understand that critique of style is not criticism of religion may itself be viewpoint discrimination. At the least, an inference is permissible that this explanation is pretextual.

The teacher's "third" and "fifth" explanations – that religious views may not be discussed in the classroom – constitute the viewpoint discrimination that is at the core of this case. Pet. App. 4.

The lower courts in this case, however, held that there was no genuine dispute as to the teacher's motives and granted respondents judgment as a matter of law. This Court should grant certiorari on this issue as well, as it involves a recurring issue that arises in several litigation contexts: issues of "mixed motive" on the part of government officials who have taken action on grounds violative of First Amendment constitutional rights but also assert other justifications for their actions (*e.g. Mt. Healthy City*, 429 U.S. 274); issues of pretext in employment discrimination cases where the genuineness of an employer's asertedly nondiscriminatory explanation for its action is challenged (*e.g. St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993)); and a wide variety of other situations where intent or official purpose is relevant to some larger legal issue. *See, e.g., Patrick v. LeFevre*, 745 F.2d 153 (2d Cir. 1984) ("sincerity" of religious claimant, for free exercise clause purposes).

The Sixth Circuit's decision in this case directly conflicts with the Eleventh Circuit's decision in *Church of Scientology*, 2 F.3d 1514. At issue in that case was a city ordinance regulating the solicitation of funds by charitable organizations. Plaintiff Church of Scientology alleged that the ordinance targeted the Church because of its particular religious

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The fourth explanation, that "the teacher felt that . . . plaintiff knew a lot about Jesus Christ" and that "part of the purpose of the paper was to have the students research a paper on a subject with which they were unfamiliar" (Pet. App. 4) is belied by the record. The teacher urged students to write on topics of personal interest and permitted topics selected by students because they already had interest and familiarity with the topic. J.A. 37, 42. The facts permit an inference that this explanation was pretextual.

The final explanation – that " 'all of the sources that you [are] going to find documenting the life of Jesus Christ derive from one source, the Bible' " (Pet. App. 4-5) – is not rational or credible. The teacher did not require that students use original sources, but permitted enclycopedias, magazines, pamphlets, and books. J.A. 38. The facts not only permit but virtually compel an inference of pretext for this explanation.

viewpoint, and pointed to record evidence supporting such an inference. The Eleventh Circuit reversed the district court's grant of summary judgment for the defendant city: "There is sufficient evidence supporting [plaintiff's] conclusion to shift to the City the ultimate burden of showing, under all the circumstances, that it would have enacted the ordinance even without the impermissible motive. The same evidence precludes judgment as a matter of law for the City." *Id.* at 1534.

The Sixth Circuit decision is also contrary to the Eighth Circuit's *en banc* decision in *Brown v. Polk County*, a case involving discharge of a government employee allegedly because of his protected free exercise of religion. 61 F.3d 650. The Eighth Circuit held that, once it was established that the discharge was motivated in part by the employee's religious activities, defendant government officials could be held liable "unless the defendants can prove that they would have fired him regardless of those activities." *Id.* at 657. The Eighth Circuit found that this required the district court to apply the "mixed motives" analysis of *Mt. Healthy* and precluded judgment for defendant officials. *Id.*

Finally, the Sixth Circuit decision conflicts with the holdings and dicta of numerous Second Circuit decisions holding, in a variety of contexts, that questions of motivation, intent, or pretext are not readily susceptible to summary judgment.[15] Review of this issue is therefore warranted as well.

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[15] *See, e.g., United States v. Certain Funds on Deposit in Scudder Tax Free Investment Account #2505103*, 998 F.2d 129, 131 (2d Cir. 1993) (admonition to view evidence in light most favorable to opponent "should especially be kept in mind when the inferences which the parties seek to have drawn deal with questions of motive, intent, and subjective feelings and reactions.") (internal quotation marks and citation omitted); *Maresco v. Evans Chemetics*, 964 F.2d 106, 113 (2d Cir. 1992) ("summary judgment is ordinarily inappropriate where . . . intent and state of mind are at issue") (internal quotation marks and citations omitted). *See also Lac Du Flambeau Indians v. Stop Treaty Abuse-Wis.*, 991 F.2d 1249, 1258 (7th Cir. 1993) ("cases involving motivation and intent are usually not appropriate

## III. ALTERNATIVELY, THIS COURT SHOULD GRANT THE WRIT, AND VACATE AND REMAND THIS CASE FOR RECONSIDERATION IN LIGHT OF *ROSENBERGER v. RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA*, 115 S.Ct. 2510 (1995).

Petitioner urges this Court to grant the writ of certiorari and set this case for plenary consideration. In the alternative, petitioner suggests that the Court grant, vacate, and remand for reconsideration in light of its decision last Term in *Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S.Ct. 2510 (1995). As noted above, the decision below conflicts in principle with *Rosenberger*'s holding that government officials may not discriminate against religious expression on the basis of its religious viewpoint. In *Rosenberger*, this Court held that, where state educational institutions permit student expression on religious topics, they may not "select[ ] for disfavored treatment those student journalistic efforts with religious editorial viewpoints." *Id.* at 2517. Here, school officials gave Brittney Settle a grade of "zero" for her paper on "The Life of Jesus Christ" not because of any general exclusion of religious topics but because Brittney's teacher did not want Brittney to write on a religious topic that might implicate Brittney's presumed Christian viewpoint.

*Rosenberger* was decided by this Court subsequent to the Sixth Circuit's decision in the instant case. Accordingly, this case may be an appropriate one in which to grant certiorari, vacate the opinion below, and remand for reconsideration in light of the principles set forth in *Rosenberger*.

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for summary judgment."); *Miller v. Fairchild Industries, Inc.*, 797 F.2d 727, 733 (9th Cir. 1986) (factual determinations about an employer's state-of-mind are "generally unsuitable for disposition at the summary judgment stage.").

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Reported at 53 F.3D 152.

Brittney Kaye SETTLE, Plaintiff-Appellant,

v.

DICKSON COUNTY SCHOOL BOARD, et al., Defendants-Appellees.

No. 93-6207.

United States Court of Appeals, Sixth Circuit.

Argued Jan. 30, 1995.
Decided May 8, 1995.

MERRITT, C.J., delivered the opinion of the court, in which WEBER, D.J., joined. BATCHELDER, J., delivered a separate opinion concurring in the result only.

The issue before us is whether Dana Ramsey, a junior high school teacher in Dickson, a small Tennessee town, violated the free speech rights of one of her ninth grade students, Brittney Settle, by refusing to accept a research paper entitled "The Life of Jesus Christ," and by giving her a "zero" for failing to write on another topic. Although this paper topic concerns religious subject matter, the plaintiff does not bring her case under the Free Exercise Clause or the Establishment Clause of the First Amendment. Instead, she has chosen to challenge Ms. Ramsey's rejection of her topic as restricting her rights of free speech under the First Amendment. The district court granted summary judgment for the defendants and dismissed the case. We now affirm the district court's judgment.

## FACTS

During the week of March 15, 1991, Ms. Ramsey assigned a research paper to her ninth-grade class at Dickson County Junior High School. In assigning the paper, the teacher stressed to the students that she wanted them to learn how to research a topic, synthesize the information they gathered, and write a paper using that information. Thus, as she explained, students could not merely expound on their own ideas. She required that each student use four sources in performing the research.

Each student could select his or her own topic, subject to the teacher's approval. She required only that each topic be "interesting, researchable and decent." She posted a sign-up sheet for each student to list the topic he or she had chosen. Between March 15 and March 22 students could sign up and change their topics at will. On March 22, Ms. Ramsey removed the sign-up sheet to approve the topics, and afterwards students had to receive her approval if they wished to change their topic. On March 26, each student was required to hand in an outline of the paper he or she planned to write.

The plaintiff originally signed up to write a paper on "Drama." Subsequently, she changed her mind after deciding that the topic might be too broad. Without Ms. Ramsey's prior approval, plaintiff attempted to submit an outline for a paper entitled "The Life of Jesus Christ." The teacher refused to accept the outline and told plaintiff she would have to select another topic. At this point, plaintiff's father intervened to complain and met with the principal of the school, Ms. Ramsey, and other school officials. Ms. Ramsey told plaintiff's father that she

would accept a paper on religion as long as it did not deal solely with Christianity or the Life of Christ. On April 3, plaintiff attempted to submit another outline, with the title "A Scientific and Historical Approach to Jesus Christ." Ms. Ramsey rejected this outline as well. Ultimately, the principal, the superintendent of schools, and the Dickson County School Board all expressed their support for Ms. Ramsey's decision and noted that the teacher had not exceeded her discretion as far as they were concerned. Plaintiff and her family decided to make an issue of the matter before the School Board and then in court.

In her statement at a hearing before the School Board, and in depositions taken for the litigation of this case, Ms. Ramsey has explained that she refused to allow plaintiff's topic for a combination of reasons. First, she stated that the student had failed to receive permission to write on the topic prior to handing in the outline. Because plaintiff did not adhere to the requirement of submitting her topic for her teacher's approval, she had to choose another topic.

Second, Ms. Ramsey said that she believed that it would be difficult for her to evaluate a research paper on a topic related to Jesus Christ. She stated that she knew that plaintiff had a strong personal belief in Christianity that would make it difficult for her to write a dispassionate research paper. Furthermore, Ms. Ramsey believed that the paper would be difficult to grade because plaintiff might take any criticisms of the paper too personally. Even remarks regarding grammar or organization might be misinterpreted as criticisms of plaintiff's religious

beliefs. Ms. Ramsey thought it would be wiser to avoid such potential misunderstandings.

Third, the teacher indicated that she "just knew that we don't deal with personal religion – personal religious beliefs. It's just not an appropriate thing to do in a public school. . . . People don't send their children to school for a teacher to get in a dialogue with personal religio[us] beliefs. They send them to learn to read and write and think. And you can do that without getting into personal religion." (J.A. at 57).

Fourth, the teacher felt that because plaintiff knew a lot about Jesus Christ, she could produce an outline without doing any significant research, and thus defeat the purpose of the exercise. The teacher stated "it was a lot easier to write a quick little preliminary outline on Jesus Christ, which she knew a lot about, which most of my students knew a lot about." (J.A. at 57-58). Further, she said that part of the purpose of the paper was to have the students research a paper on a subject with which they were unfamiliar. (J.A. at 70).

Fifth, Ms. Ramsey at one point during her testimony before the School Board stated "the law says we are not to deal with religious issues in the classroom." (J.A. at 222). She seems to have thought that she should not allow plaintiff to write on the topic of her choice because the law may prohibit this kind of religious paper in public school classrooms.

Sixth, while testifying before the school board, Ms. Ramsey also stated that she rejected the topic because the assignment required the use of four sources and that "all of the sources that you [are] going to find documenting

the life of Jesus Christ derive from one source, the Bible." (J.A. at 221). She seems to have meant primary or original sources, but during a previous deposition she said she allowed secondary sources: "I required that they have two books and two encyclopedias or resources, but they could substitute using magazine articles or pamphlets." (J.A. at 38).

As a result of plaintiff's refusal to comply with the requirements Ms. Ramsey had specified, she received a zero for the assignment. The student subsequently sued Ms. Ramsey for violating her rights of free speech. Judge Wiseman dismissed the case on a motion for summary judgment relying on *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988), which upheld a school official's decision to censor a story in the school newspaper about pregnancy at the school. Plaintiff now appeals the district court's ruling on two grounds. She contends that as a matter of law, Ms. Ramsey violated her First Amendment rights as applied to the states by the Fourteenth Amendment, and alternatively argues that there is a dispute of material fact as to what Ms. Ramsey's actual reasons were for refusing to let her write the paper on Jesus Christ, making summary judgment inappropriate. We take up these arguments in turn.

## DISCUSSION

After reviewing the precedents concerning students' rights of free speech within a public school, we find few cases that address the conflict between the student's rights of speech in the classroom and a teacher's responsibility to encourage decorum and scholarship, including

her authority to determine course content, the selection of books, the topic of papers, the grades of students and similar questions. Students do not lose entirely their right to express themselves as individuals in the classroom, but federal courts should exercise particular restraint in classroom conflicts between student and teacher over matters falling within the ordinary authority of the teacher over curriculum and course content. "Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Epperson v. Arkansas*, 393 U.S. 97, 104, 89 S.Ct. 266, 270, 21 L.Ed.2d 228 (1968).

The free speech rights of students in the classroom must be limited because effective education depends not only on controlling boisterous conduct, but also on maintaining the focus of the class on the assignment in question. So long as the teacher violates no positive law or school policy, the teacher has broad authority to base her grades for students on her view of the merits of the students' work. *Board of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978); *Parate v. Isibor*, 868 F.2d 821, 828 (6th Cir.1989) ("[t]he individual professor's assignment of a letter grade is protected speech.") Grades are given as incentives for study, and they are the currency by which school work is measured.

Plaintiff argues that Ms. Ramsey's rejection of her paper topic infringed upon her fundamental right to freedom of speech. The censorship in the *Hazelwood* case, referred to earlier, involved a school newspaper, a kind of open forum for students, and even there the Supreme

Court said that "educators do not offend the First Amendment by exercising editorial control over the style and context of student speech in school-sponsored activities so long as their actions are reasonably related to legitimate pedagogical concerns." 404 U.S. at 273, 92 S.Ct. at 511. Where learning is the focus, as in the classroom, student speech may be even more circumscribed than in the school newspaper or other open forum. So long as the teacher limits speech or grades speech in the classroom in the name of learning and not as a pretext for punishing the student for her race, gender, economic class, religion or political persuasion, the federal courts should not interfere.

Like judges, teachers should not punish or reward people on the basis of inadmissible factors – race, religion, gender, political ideology – but teachers, like judges, must daily decide which arguments are relevant, which computations are correct, which analogies are good or bad, and when it is time to stop writing or talking. Grades must be given by teachers in the classroom, just as cases are decided in the courtroom; and to this end teachers, like judges, must direct the content of speech. Teachers may frequently make mistakes in grading and otherwise, just as we do sometimes in deciding cases, but it is the essence of the teacher's responsibility in the classroom to draw lines and make distinctions – in a word to encourage speech germane to the topic at hand and discourage speech unlikely to shed light on the subject. Teachers therefore must be given broad discretion to give grades and conduct class discussion based on the content of speech. Learning is more vital in the classroom than free speech. All six of Ms. Ramsey's stated reasons

for refusing to allow Brittney to write the paper fall within the broad leeway of teachers to determine the nature of the curriculum and the grades to be awarded to students, even the reasons that may be mistaken. It is not for us to overrule the teacher's view that the student should learn to write research papers by beginning with a topic other than her own theology. Papers on the transfiguration of Jesus and similar topics may display more faith than rational analysis in the hands of a young student with a strong religious heritage – at least the teacher is entitled to make such a judgment in the classroom.

The case relied upon most heavily by plaintiff's lawyers, *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), supports the conclusion that teachers have broad discretion in limiting speech when they are engaged in administering the curriculum. In *Tinker*, the Court held that a student could wear a black armband to protest the Vietnam War. But, the Court found central to its holding that wearing the armband would not "substantially interfere with the work of the school or impinge on the rights of other students." *Id.* at 509, 89 S.Ct. at 738. The Court specifically stated that a school could limit otherwise protected speech if it did so as part of a "prescribed classroom exercise." *Id.*

Ms. Ramsey's justification that the law may prohibit teaching about religion in public schools may be a mistake of law, depending on what she meant. Similarly, her contention that there is only one source for a paper on Jesus Christ may also be mistaken. According to plaintiff's lawyers, these mistakes raise the question of pretext and call forth an attack on the teacher's integrity.

The lawyer for plaintiff contended at oral argument that all of Ms. Ramsey's reasons are pretexts for punishing her for her desire to express her thoughts about the life of Jesus. He seemed to believe that the teacher limited plaintiff's speech because of hostility to her religion, and he argued that we should draw an inference of lying from the two "mistaken" reasons. The argument that Ms. Ramsey was untruthful in expressing her real reasons has no basis in the record, as both the School Board and the District Court found, and arises from an unfortunate tendency in lawsuits for parties to cavil at their opponents through unsupported accusations. There is no basis for finding a real dispute of fact about Ms. Ramsey's motives, and the District Court was therefore correct in disposing of the case on summary judgment.

Accordingly, the judgment of the district court is AFFIRMED.

BATCHELDER, Circuit Judge, concurring.

While I agree with the majority that the district court properly granted summary judgment for the defendants-appellees in this case, I respectfully disagree with both the majority's discussion of the facts and its analysis of the law. Consequently, I concur only in the result of the majority opinion.

There is no doubt that a balance must be struck between a student's right to freedom of expression in the classroom and a teacher's right to control and manage that classroom. And while it is true that courts should not meddle in the day to day operation of school functions, " '[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' " *Epperson v. Arkansas*, 393 U.S. 97, 104, 89 S.Ct.

266, 270, 21 L.Ed.2d 228 (1968) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487, 81 S.Ct. 247, 251, 5 L.Ed.2d 231 (1960)). In the words of the Supreme Court, it is indisputable that "students . . . [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506, 89 S.Ct. 733, 736, 21 L.Ed.2d 731 (1969).

However, we ought not go about striking this balance unless the facts of the case require it. In my view, this is not such a case. The crux of Brittney's claim in this case is that she was assigned to choose an "interesting, researchable and decent" topic for a research paper in her ninth-grade English class, she chose as her topic "The Life of Jesus Christ," she was not permitted to write the paper on this topic *because it was religious*, and this deprived her of her right to engage in free expression. Although I do not think that the facts in regard to this claim are as clear as the majority opinion portrays them as being, the *material* facts are clear, those facts are not in dispute, and those facts do not state a First Amendment claim. This case is not about Brittney Settle's First Amendment right to express her views, opinions or beliefs, religious or otherwise, in the classroom. This case is about whether Brittney's ninth-grade English teacher may determine what topic is appropriate to satisfy a research paper assignment in that class.

The material facts are that Ms. Ramsey assigned a research paper to her ninth-grade class, that she permitted the students to choose their own topics, and that she restricted that choice only by these criteria – that the topic be "interesting, researchable and decent." The paper was to be a research paper, *not* an opinion paper, and it

was to be written solely to be turned in to the teacher for a grade, *not* for publication in a school newspaper or any other forum. Brittney timely chose a topic, changed that topic without the teacher's permission to "The Life of Jesus Christ," and was denied permission to write her paper on the changed topic. Ms. Ramsey gave a number of reasons for refusing to permit Brittney to write her paper on the life of Christ, Brittney refused to choose a new topic, Ms. Ramsey gave her a "zero," and her decision was upheld by school officials. This lawsuit ensued.

In my view, these facts simply do not state a constitutional claim. Ms. Ramsey was not engaged in restricting Brittney's expression. She was engaged in restricting Brittney's choice of topic for a research paper. Brittney does not expressly claim that a classroom teacher cannot control the subject matter for such assignments without violating the students' rights of expression. Rather, she claims that the restrictions on this assignment were so loose that her choice of topic fit the assignment, and that Ms. Ramsey refused to permit her to use that topic because the topic was religious. Brittney bolsters her claim by asserting that Ms. Ramsey's reasons for refusing to permit the topic were obviously pretextual.

I would agree that some of Ms. Ramsey's after-the-fact reasons are not very convincing. And I do not agree with the majority's finding that there is no basis in the record for a claim that Ms. Ramsey was not truthful in stating those reasons. More importantly, however, I do not think that Ms. Ramsey's after-the-fact statement of reasons, even if those reasons were pretextual, were pretexts for suppressing Brittney's expression. They were pretexts for an error in judgment. The one thing which

this record demonstrates clearly is that what Ms. Ramsey was guilty of was failing to provide this ninth-grade class with substantive guidelines for choosing their research paper topics. Faced with Brittney's new and unapproved topic, Ms. Ramsey realized that the criteria that she had in mind, but had not adequately explained to the class, limited the acceptable topics well beyond the general criteria of "interesting, researchable and decent."

Implicit in the majority's opinion is the view that classroom teachers can make mistakes of judgment in determining how to teach, and these mistakes, so long as they are not based on impermissible criteria, do not give rise to claims of constitutional deprivations. I wholly agree. And on the facts of this case, that is all that needs to be said.

The majority, however, has engaged in a First Amendment analysis of this case. As I have stated, I do not believe that the facts here implicate Brittney's First Amendment rights, but I take very seriously Brittney's right to express her views at school – including her religious beliefs – and for that reason, I must respectfully disagree with the majority's analysis. "Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally." *McDaniel v. Paty*, 435 U.S. 618, 641, 98 S.Ct. 1322, 1336, 55 L.Ed.2d 593 (1978) (Brennan, J., concurring). Brittney's status as a high school student does not alter the fundamental core of her right to freedom of expression under the First Amendment. In the context of the classroom, however, there are necessary limits on student expression. The rights of students to

express their views in the public classroom "are not automatically coextensive with the rights of adults in other settings." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682, 106 S.Ct. 3159, 3164, 92 L.Ed.2d 549 (1986).

It is the "oft-expressed view" of the Supreme Court that "the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273, 108 S.Ct. 562, 571, 98 L.Ed.2d 592 (1988) (citations omitted). That, it seems to me, is precisely why complaints such as the one Brittney Settle brings before us today, do not state constitutional claims, and cannot be made to fit within the framework of cases such as *Hazelwood* and *Tinker*, upon which the majority attempts to rely.

The facts in this case are not analogous to the facts in *Hazelwood*. Brittney's paper was to be written solely for the purpose of fulfilling an assignment in English class. It was not for publication in a school-sanctioned newspaper,[1] or in any other forum. There is no way to make a colorable claim that this paper is speech which might be viewed by the community as bearing the imprimatur of the school, the circumstance which was central to the

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[1] I am puzzled by the majority's characterization of the school newspaper in *Hazelwood* as "a kind of open forum for students. . . . " Majority opinion at 155. The Supreme Court in that case explicitly found that the district court had correctly dismissed as not credible the students' claim that they believed they could publish "practically anything" in the paper, and held that the newspaper was not a forum for public expression. *Hazelwood*, 484 U.S. at 269 & n. 2, 108 S.Ct. at 569 & n. 2.

Supreme Court's holding in *Hazelwood*. *Id.* at 270-71, 108 S.Ct. at 569-70.

Neither is this case like the situation in *Tinker*. A research paper is not an expression of opinion, and the restriction of choice of topic is not readily analogous to the kind of pure expression of student opinion, that happened to take place in the classroom, that the Supreme Court addressed there. *Tinker*, 393 U.S. at 511, 89 S.Ct. at 739.

If there were a First Amendment issue here, it would fall somewhere in between *Hazelwood* and *Tinker* as a form of student expression *allowed* under the school curriculum but *not* sponsored or endorsed by the school. Certainly not all student speech in the classroom bears the imprimatur of the school. This seems as obvious as the opposite proposition; students do not have an unlimited or unbridled right to speak out freely while on school property. The Supreme Court has acknowledged that a difference exists "between speech a school must *tolerate* and speech a school must affirmatively promote." *Alabama Student Party v. Student Government Association*, 867 F.2d 1344, 1347 (11th Cir.1989) (emphasis added) (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988)).

The bottom line is that when a teacher makes an assignment, even if she does it poorly, the student has no constitutional right to do something other than that assignment and receive credit for it. It is not necessary to try to cram this situation into the framework of constitutional precedent, because there is no constitutional question.

That does not, however, make the majority's treatment of Ms. Ramsey's stated reasons for rejecting Brittney's paper topic irrelevant. The majority opinion sets out six reasons given by Ms. Ramsey for refusing to permit Brittney to write her research paper on "The Life of Jesus Christ," and holds that "[a]ll six of Ms. Ramsey's stated reasons for refusing to allow Brittney to write the paper fall within the broad leeway of teachers to determine the nature of the curriculum and the grades to be awarded to students, even the reasons that may be mistaken." Majority opinion at 156. I cannot agree. Ms. Ramsey said, for example, that " 'we don't deal with personal religion' " and " 'the law says we are not to deal with religious issues in the classroom.' " Majority opinion at 154. On the contrary, religious speech, like all speech, does have a place in the classroom. According to the Supreme Court:

> Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.

*Epperson v. Arkansas*, 393 U.S. 97, 103-04, 89 S.Ct. 266, 269-70, 21 L.Ed.2d 228 (1968) (footnote omitted). Ms. Ramsey was dead wrong in her view that Brittney's paper topic was impermissible because a paper of a religious nature is impermissible in the public schools. Had the assignment been to write a paper of opinion, and had

Ms. Ramsey rejected the paper on the ground of its religious content alone, Brittney's freedom of speech truly would have been violated. I do not believe, therefore, that the majority correctly states the law in this regard by holding "[l]earning is more vital in the classroom than free speech." Majority opinion at 156. "In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 509, 89 S.Ct. at 738.

Brittney also attempts to raise an equal protection claim contending that because Ms. Ramsey permitted other students to choose research topics based on religious themes, Brittney was denied constitutional equal protection under the laws. Several other students in Brittney's class were permitted to research and write on the topics "Spiritualism," "Reincarnation," and "Magic Throughout History." Once again, however, it was within the teacher's discretion to determine whether these topics conformed to the restrictions inherent in the research assignment. So long as the student authors would be required to compile research and organize facts in an objective fashion, their topics, religious or not, could be judged appropriate for the assignment. Ms. Ramsey properly exercised her power of control over the classroom in distinguishing Brittney's topic from those others in her ninth-grade class. On these facts, Brittney has not presented an equal protection claim.

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

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No: 93-6207

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BRITTNEY KAYE SETTLE,

Plaintiff-Appellant,

v.

DICKSON COUNTY SCHOOL BOARD, et al.,

Defendants-Appellees.

Before: **Merritt,** Chief Judge; **Batchelder,** Circuit Judge; **Weber,** District Judge.

## JUDGMENT

(Filed May 8, 1995)

ON APPEAL from the United States District Court for the Middle District of Tennessee at Nashville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

**ENTERED BY ORDER**
**OF THE COURT**

/s/ Leonard Green
Leonard Green, Clerk

Issued as Mandate: 5/30/95

COSTS: No Costs Attest:

Filing Fee ..... $
Printing ..... $
Total ..... $

A True Copy.
Attest:

/s/ Diane Schnur
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

| | | |
|---|---|---|
| BRITTNEY KAYE SETTLE, Plaintiff | ) | |
| vs. | ) | No. 3: 91-0562 |
| DICKSON COUNTY SCHOOL BOARD, ET AL., Defendants. | ) | |

MEMORANDUM

This is a Civil Rights action brought pursuant to 42 U.S.C. § 1983 by Brittney Kaye Settle against the Dickson County School Board and three of its employees. Plaintiff claims that her First Amendment freedom of speech rights were violated when she was not allowed to write her research paper on a topic of her choice. She alleges violations of her First and Fourteenth Amendment rights and seeks declaratory and injunctive relief. Both sides have moved for summary judgment. For the reasons set forth below, the Court finds that no Constitutional violation has occurred, summary judgment is awarded to defendants, and the case dismissed.

FACTUAL BACKGROUND

During the week of March 15, 1991, Defendant Dana Ramsey, a ninth grade teacher at Dickson County Junior High School ("DJHS"), assigned a research paper to her class. The purpose of the paper was to teach her students how to research a topic and write a paper using this information. As Mrs. Ramsey made clear, it was not to be

about the students' own ideas. Selection of the topic of the paper was left entirely up to the student provided that the topic was "interesting, researchable, and decent." Mrs. Ramsey allowed the students to choose their own topics as a means of getting the students to "show ownership" of their compositions.

The students were given from March 15 through March 22 to select a topic and indicate their selection on a sign-up sheet posted in the classroom. The students could change their subject at any time during this period simply by scratching off the previous subject and adding a new one. On Friday March 22, Mrs. Ramsey removed the sign-up sheet. After the list was removed, the students were still allowed to change their topic but only after notifying Mrs. Ramsey. On Tuesday, March 26, the students were to submit their preliminary outlines, and no changes were allowed after that date, except for "modification" of issues within the topic.

After originally signing up for the topic of "Drama," Brittney changed her mind and decided on a new topic because this topic was too broad. On the morning of March 26, she attempted to hand in an outline entitled the "Life of Jesus Christ" without having first asked for approval. Mrs. Ramsey rejected the change, and after class explained to Brittney that she failed to follow the proper procedure and that this new topic would not serve the paper's purpose. In addition, she told Brittney that her new topic was inappropriate because it dealt with Brittney's personal religion and would be a difficult topic to

write objectively.[1] Later that afternoon, Mrs. Ramsey told Brittney that her choice of topic "could lead to a bad experience." In addition, Mrs. Ramsey gave Brittney another chance to submit a different topic on the following day without penalty because she felt that Brittney may have not understood the procedure or may not have truly wanted to write on drama. In fact, Mrs. Ramsey told Brittney that she could write a paper with religious aspects as long as it did not solely deal with Christianity or the life of Christ. In her affidavit, Mrs. Ramsey stated, "[t]he whole point was for this [paper] to be a pleasant experience."

On March 28, Mr. Settle, Brittney's father, contacted Reed Evans, principal of DJHS. He wanted to know why Mrs. Ramsey allowed writings on spiritualism, the occult, and reincarnation and would not allow his daughter to write on the life of Jesus Christ. Evans then talked with Mrs. Ramsey and learned that Brittney failed to follow proper procedures. Based upon this information, he then gave Mrs. Ramsey his full support for her decision. A meeting took place on March 27 between Mr. Evans, Mr. Settle, Mrs. Ramsey in which Mr. Evans agreed to look

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[1] Mrs. Ramsey did accept outlines on topics such as reincarnation, spiritualism, and the occult, which discussed religious figures from history and their doctrinal teachings. These papers, however, did not focus on religion, and the information provided served as background information. For example, a paper on reincarnation discussed Buddhism and Hinduism; a paper entitled "Spiritualism" noted that some religions make it a part of their beliefs; and the composition on "Magic Throughout History" contained such titles as "Jews believe in Baal," "Demons Are Evil Spirits," and "Gods Are Good Spirits."

further into the matter. Mr. Evans then talked to Mrs. Ramsey about the situation and again based his decision on Brittney's failing to follow proper procedures.

Mr. Settle also called George Caudill, superintendent of the Dickson County school system, which led to a meeting between Caudill, Evans, and Ramsey. It is unclear from the record if this is the same meeting mentioned in the preceding paragraph. Following up his investigation, Caudill called Settle and told him that Mrs. Ramsey had the right to draw the parameters and guidelines in her classroom. Since it was his understanding that Brittney did not comply, he told Mr. Settle that he fully supported Mrs. Ramsey's actions.

As a result of failure to comply, Mrs. Ramsey gave her a zero for the assignment. On April 1, 1991, the Dickson County School Board reviewed her actions and voted to uphold them.

## ANALYSIS

There are two methods of analysis when dealing with student speech in public schools. The first method was established in *Tinker v. Des Moines Independent Com. Sch. Dist.*, 393 U.S. 503 (1969) and deals with the prohibition of a student's individual, personal expression while on school premises. The second method was established in *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) and deals with the limits of a school official's authority over student expression that is school sponsored.

In *Tinker*, which the Plaintiff argues to be dispositive, the Supreme Court set forth a two pronged test for an

individual student expressing his own opinions while at school. A student "may express his opinions, even on controversial subjects . . . , if (1) he does so without 'materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school' and (2) without colliding with the rights of others." Id. at 513. Under *Tinker*, a student's expressions on public school premises are not protected if they "materially disrupt classwork or involve substantial disorder or invasion in the rights of others." *Id.* at 513. If these "restricted circumstances" are not applicable then the student's speech is protected. *Id.* Furthermore, this test applies not only to "classroom hours" but also "in the cafeteria . . . , on the playing field, or on campus during authorized hours." *Id.* at 512-13.

*Hazelwood* teaches that "educators [can] exercis[e] editorial control over the style and content of student speech in school-sponsored expressive activities *so long as their actions are reasonably related to legitimate pedagogical concerns.*" *Id.* at 273 (emphasis added). The Court described these activities as being "part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." *Id.* at 273. In making this determination, the Court reasoned:

> Educators are entitled to exercise greater control over . . . this form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be

> inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.

*Id.* at 271.

Furthermore, although students in public schools are protected by the First Amendment guarantees, their free speech protection is not "automatically co-extensive with the rights of adults in other settings." *Id.* at 266.

Plaintiff insists that *Tinker* is controlling. She contends that her paper was clearly a personal expression because it was to be her own work product, was assigned to "show ownership" of her topic, and was not to be funded by or circulated around the school as with a school newspaper. Plaintiff argues that the *Tinker* test is easily fulfilled. Applying the facts to this test, Plaintiff asserts that Mrs. Ramsey's fear of disturbance and interference with the rights of others lacks a substantial basis. In addition, Plaintiff states that even if she did have a valid fear of disturbance, the *Tinker* court held "fear or apprehension of disturbance is not enough to overcome the right of freedom of expression." *Id.* at 508. Thus, Mrs. Ramsey should have allowed her to write her paper under *Tinker*.

Defendants rely upon *Hazelwood*. First, defendants argue that Plaintiff strains to show that *Tinker* controls. Plaintiff claims that because her paper was "personal" in nature, it was not subject to "censorship" unless her expression "materially and substantially interfer[ed] with the requirements of appropriate discipline in the operation of the school . . . " *Tinker*, 393 U.S. at 513. Defendant asserts that this argument is simply without merit and

that the issue is not whether the expression is "personal" per se, for all speech can be personal to the speaker. Rather, the issue is "whether the First Amendment requires a school affirmatively to promote particular student speech."[2] *Hazelwood*, 484 U.S. at 270. In other words, must a school accept a student's particular form of speech in a "school-sponsored setting?" Defendant asserts that the answer is clearly no, provided that the speech "may fairly be characterized as part of the school curriculum" and is "designed to impart particular knowledge or skills to student participants" and that the restrictions are "reasonably related to legitimate pedagogical concerns." *Id.* at 271-73.

Defendant is correct. *Hazelwood* provides the appropriate rationale and the controlling rule of law on these facts. This case does not present an issue of personal expression but, rather, one of the school's " . . . control over . . . the school curriculum." *Id.* at 271. Here, the research paper assignment was designed not to elicit personal views or beliefs, but to teach research and writing skills. It was part of the regular school curriculum and was supervised by faculty. Plaintiff failed to conform to established deadlines and her subject change could have been rejected on that ground alone as "reasonably

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[2] The language of this issue seems rather vague; however, the Supreme Court clarifies this ambiguity and states that this issue "concerns [the] educator's authority over . . . the school curriculum." *Id.* at 271.

related to pedagogical concerns."[3] However, Mrs. Ramsey's fear that Plaintiff's motivation for changing her paper was because of her familiarity with the subject and the ease with which it could be written is also a legitimate pedagogical concern. Mrs. Ramsey was also fearful that a paper based largely on a student's personal religious beliefs could not be criticized for style, context, accuracy, source documentation, etc. without inciting personal offense, particularly for a ninth grade student.[4] This, too,

---

[3] Q. Did you explain to Brittney at that time that due to the fact that she had missed her deadline for getting her topic approved, that you would not be able to accept this paper?

A. Yes.

Q. So was the reason that you didn't accept the paper – was it because she had missed the deadline for approval on Friday, the previous Friday, or because she chose the life of Jesus Christ?

A. It was both. She did not – had she – she did not submit it properly as everyone else in both of my classes did. And I had made a real big deal about that, so they all knew. And they all know me well, to know that when I set up a procedure, I don't make exceptions. So if I've set up the procedure, then I expect everyone to follow it. So that was a primary concern. The other concern, as I've just told you, I didn't feel it was an appropriate topic for someone her age. It dealt too closely with her private religious beliefs.

Deposition of Dana Ramsey, at 27, 28.

[4] A. Well, when you are critiquing a paper – these are fourteen year olds. They are not skilled, obviously, in this process or I wouldn't be teaching it on such a basic level. I felt – when you are critiquing someone's work, they take it very personally. And if you add to it that it's leading with personal religion values that may be intertwined in it, it's a no-win situation. If you critique the paper because of structure or whatever, then you are opening the door to, "There's nothing wrong

is a legitimate pedagogical concern. Furthermore, there is no evidence that these assigned reasons are pretextual.

Next, Plaintiff states that Mrs. Ramsey violated the written policy "Religion In The Curriculum" of the Dickson County Board of Education. The policy states in relevant part as follows:

> Religious institutions and orientations are central to human experience, both past and present. An education excluding such a significant aspect would be incomplete. It is essential that the teaching about – and not of religion be conducted in a factual, objective, and respectful manner.
>
> Therefore, the policy of the Board of Education shall be as follows:
>
> (1) The Board supports the inclusion of religious literature, music, drama and the arts in the curriculum and in school activities, provided it is intrinsic to the learning experience in the various fields of study and presented objectively.
>
> (2) The emphasis on religious themes in the arts, literature and history should be only as extensive as necessary for a balanced and comprehensive study of these areas. Such studies shall never foster any particular religious tenets or demean any religious beliefs.
>
> (3) Student-initiated expressions to questions or assignments which reflect their beliefs or

---

with this. You just don't agree with me; therefore, that's why I got a bad grade."
Deposition of Dana Ramsey, at 26-27.

> non-beliefs about a religious theme shall be accommodated. For example, students are free to express religious belief or non-belief in compositions, art, music, speech, and debate.

Focusing on the third provision, Plaintiff alleges that Mrs. Ramsey incorrectly interpreted the meaning of "composition," as expressed by the written policy. Mrs. Ramsey defines a composition as containing personal experiences and observations, as opposed to an objective research paper. This is a reasonable interpretation; it comports with the learning objective of the exercise; and it has a valid pedagogical justification. The written policy was not violated.

Plaintiff asserts that Mrs Ramsey has failed to maintain "a benevolent neutrality . . . permit[ting] religious exercise to exist without sponsorship and without interference." *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970). In addition, Plaintiff cites *Abington v. Schemp*, 374 U.S. 203, 225 (1963), in which the Supreme Court recognized the possibility of hostility toward religion developing in the public school system. Justice Clark declared for the Court that the state may not establish a "religion of secularism" by "affirmatively opposing or showing hostility to a religion," as to do so would then have the state "preferring those who believe in no religion over those who do believe." Thus, Plaintiff asserts that in order to avoid establishing a religion of "secularity," public school authorities should accommodate students who wish to express ideas in terms of their religious faith. The Board policy expressly authorizes such *idea expression*, but, again, this exercise was not one of idea expression but a research paper. Plaintiff's argument is specious.

The religion clauses of the First Amendment are not implicated by the facts of this case. The free speech claim is governed by *Hazelwood,* and plaintiff's claim falls under that analysis. In view of the court's holding, it is unnecessary to address the qualified immunity issue. Summary judgment is granted all defendants. An appropriate order will enter.

/s/ Thomas A. Wiseman, Jr.
Thomas A. Wiseman, Jr.
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

| | | |
|---|---|---|
| BRITTNEY KAYE SETTLE<br>Plaintiff,<br>vs.<br>DICKSON COUNTY SCHOOL BOARD, ET AL.,<br>Defendants. | ) | No. 3: 91-0562 |

**ORDER**

In accordance with the accompanying memorandum, summary judgment is granted to all defendants and this case is hereby DISMISSED.

IT IS SO ORDERED.

/s/ Thomas A. Wiseman, Jr.
Thomas A. Wiseman, Jr.
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

| | | |
|---|---|---|
| BRITTNEY KAYE SETTLE<br>Plaintiff,<br>VS.<br>DICKSON COUNTY SCHOOL BOARD, ET AL.,<br>Defendants. | ) | CASE NO. 3-91-0562<br>NOTICE OF APPEAL |

Notice is hereby given that Brittney Kaye Settle, Plaintiff above named, hereby appeals to the United States Court of Appeals for the 6th Circuit from the Order of Summary Judgment granted in favor of all Defendants in this case by the Honorable Thomas A. Wiseman, Jr., U.S. District Judge, entered in this action on the 17th day of August, 1993.

This Notice of Appeal being filed this the 2 day of September, 1993.

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SUPREME COURT OF THE UNITED STATES

*No.*

A-86

Brittney Kaye Settle,

Petitioner

v.

Dickson County School Board, et al.

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ORDER

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UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including September 25, 1995.

/s/ John Paul Stevens
Associate Justice of the Supreme
Court of the United States

Dated this 1st,

day of August, 1995.

(2)

Supreme Court, U.S.
FILED
OCT 25 1995

No. 95-507

# IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

**BRITTNEY KAYE SETTLE,**

*Petitioner,*

**V.**

**DICKSON COUNTY SCHOOL BOARD, et al.,**

*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

May a secondary school teacher control curriculum based student speech when the control exerted is "reasonably related to a legitimate pedagogical concern."

## LIST OF PARTIES

Pursuant to Supreme Court Rules 14.1(b) and 24.2, the parties to this proceeding are:

Petitioner:

Brittney Kay Settle, by Next Friend, Jerry Settle

Respondents:

The Dickson County School Board; George Caudill, in his official capacity as Superintendent of Dickson County Schools, Reed Evans, in his official capacity as Principal, and Dana Ramsey, in her official capacity.[1]

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1. In her application, Petitioner claims that Ms. Dana Ramsey is sued in her official capacity, when, in fact, the Complaint raises an individual capacity claim, to which the defense of qualified immunity was asserted. It is presumed that the individual capacity claim has now been abandoned.

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NO. 95-507

BRITTNEY KAYE SETTLE,
Petitioner,

V.

DICKSON COUNTY SCHOOL BOARD, et al.,
Respondents,

---

# RESPONDENTS' BRIEF IN OPPOSITION

---

TO THE HONORABLE SUPREME COURT:

The Respondents, DICKSON COUNTY SCHOOL BOARD, GEORGE CAUDILL, REED EVANS, and DANA RAMSEY, respectfully request that this Court deny the Petition for a Writ of Certiorari submitted by Petitioner, BRITTNEY KAY SETTLE.

## OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1-16) is reported at 53 F. 3d 152 (6th Cir. 1995). The opinion of the District Court (Pet. App. 19-29) is unreported.

## CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the U.S. Constitution provides:

> Congress shall make no law...abridging the freedom of speech....[2]

---

2. In her application, Petitioner cites both the establishment clause and the free exercise clause as being involved in this case. However, these two clauses were not relied upon below.

## STATEMENT OF THE CASE

1. This is a Civil Rights case brought pursuant to 42 U.S.C. Section 1983. Petitioner claims that her first amendment freedom of speech rights were violated when she was not allowed to write her ninth grade research paper on a topic of her choice; notwithstanding her failure to meet certain deadlines regarding the paper and notwithstanding any attempt by her to obtain specific permission from her teacher to change or modify her topic.

2. On March 15, 1991, Defendant Dana Ramsey, a ninth grade teacher at Dickson County Junior High School ("DCJH"), assigned a research paper to her class. (J.A. 27)[3] The purpose of the paper was to teach her students how to gather information, write a paper using this information, but above all, to learn the process of learning so that when the students got out of school they would know how to go about finding information on a topic they would be interested in. (J.A. 6). Selection of the topic was left entirely up to the student provided that the topic was interesting, researchable, and something that would enable the student to learn the process. (J.A. 29). Ms. Ramsey required four resources for the paper even though the school library was small. (J.A. 30).

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3. "J.A." refers to the Joint Appendix in the Court of Appeals.

The students were given from March 15 through March 22 to select a topic and indicate their selection on a sign-up sheet posted in the classroom. (J.A. 37-38). The students could change their subject at any time during this period simply by scratching off the previous subject and adding a new one. (Id). On Friday, March 22, Ms. Ramsey removed the sign-up sheet. (Id). After the list was removed, it was not impossible for the students to change their topic, but only after notifying Ms. Ramsey and obtaining her specific approval, and explaining why the topic was to be changed. (J.A. 42). On Tuesday, March 26, the students were to submit their preliminary outlines, and no changes were allowed after that date, except for "modification" of issues within the topic. (J.A. 31, 32, 37).

After originally signing up for the topic of "Drama," Petitioner changed her mind and decided on a new topic. On the morning of March 26, and after the deadline for topic change, Petitioner attempted to hand in an outline entitled the "Life of Jesus Christ" without having first asked for approval. (J.A. 43). This type of unilateral topic change was a concern for Ms. Ramsey because "One of the problems you have with kids this age who've never done this -- It's kind of like a cow: the grass is always greener on the other side. So rather than sitting down and digging into a topic, they think the answer to the problem of organization is just to change topics." (J.A. 44). Ms. Ramsey rejected the change, and after class explained to the

Petitioner that she failed to follow the proper procedure and that this new topic would "not fit in with what [she] was trying to do and that it would be better to work with the drama topic." (J.A. 44). In addition, she told the Petitioner that the new topic was inappropriate because it dealt with Petitioner's personal religion and would be a difficult topic to write about objectively. (Id). Later that afternoon, Ms. Ramsey told the Petitioner that her choice of topic "could lead to a bad experience." (J.A. 45-46). In addition, Ms. Ramsey gave Petitioner another chance to submit a different topic on the following day without penalty because she felt Petitioner may not have understood the procedure or may not have truly wanted to write on drama. (J.A. 60).

In fact, Ms. Ramsey told Petitioner that she could write a paper with religious aspects as long as it did not solely deal with her personal religious redeemer. (J.A. 69). This offer was rejected by Petitioner based upon the advice of counsel. (Id).

On March 28, Mr. Settle, Petitioner's father, contacted Reed Evans, Principal of DCJH. (J.A. 166). He wanted to know why Ms. Ramsey allowed writings on spiritualism, the occult, and reincarnation and would not allow his daughter to write on the life of Jesus Christ. (Id). Mr. Evans then talked with Ms. Ramsey and learned that Petitioner failed to follow proper procedures. (J.A. 167, 170). Based upon

this information, he then gave Ms. Ramsey his full support for her decision. A meeting took place on March 27 between Mr. Evans, Mr. Settle and Ms. Ramsey in which Mr. Evans agreed to look further into the matter. (Id). Mr. Evans then talked to Ms. Ramsey about the situation and again based his decision on Petitioner's failure to follow proper procedures. (Id).

Mr. Settle also called George Caudill, superintendent of the Dickson County school system, which led to a meeting between Caudill, Evans, and Ramsey. Following up his investigation, Caudill called Settle and told him that Ms. Ramsey had the right to draw the parameters and guidelines in her classroom. (J.A. 184-185). Since it was his understanding that Petitioner did not comply with the procedural guidelines for the paper, he told Mr. Settle that he fully supported Ms. Ramsey's actions. (Id).

3. Petitioner brought suit pursuant to 42 U.S.C. §1983 against Respondents on July 18, 1991, in the United States District Court for the Middle District of Tennessee. Petitioner asserted that her First Amendment free speech rights were violated by Respondents by not allowing her to write her ninth grade research paper on a topic of her choice. (J.A.1)

Respondents answered denying that Petitioner's free speech rights had been violated, and asserted that there was no unconstitutional custom or policy

existing in Dickson County which violated Petitioner's free speech rights. Respondent, Dana Ramsey, also asserted the defense of qualified immunity. (J.A. 196).

Both parties moved for Summary Judgment. The District Court, rejecting the strained analysis offered by Petitioner that Tinkler v. Des Moines Community School District, 393 U.S. 503, 89 S.Ct. 733, 21 L. Ed. 2d 731 (1969) supplied the rule of decision in this case, held that Hazelwood School District v. Kuhlmeir, 484 U.S. 260, 108 S. Ct. 562 98 L. Ed. 2d 592 (1988),

> provides the appropriate rationale and the controlling rule of law on these facts. This case does not present an issue of personal expression but, rather, one of the school's "...control over...the school curriculum." Id, at 271. Here, the research paper assignment was designed not to elicit personal views or beliefs, but to teach research and writing skills. It was part of the regular school curriculum and was supervised by faculty. Petitioner failed to conform to established deadlines and her subject change could have been rejected on that ground alone as "reasonably related to pedagogical concerns." However, Ms. Ramsey's fear that Petitioner's motivation for changing her paper was because

> of her familiarity with the subject and the ease with which it could be written is also a legitimate pedagogical concern. Ms. Ramsey was also fearful that a paper based largely on a student's personal religious beliefs could not be criticized for style, context, accuracy, source documentation, etc. without inciting personal offense, particularly for a ninth grade student. This, too, is a legitimate pedagogical concern.

(J.A. 235-236).

4. The United States Court of Appeals for the Sixth Circuit affirmed. The court acknowledged that "[F]ederal courts should exercise particular restraint in classroom conflicts between student and teacher over matters falling within the ordinary authority of the teacher over curriculum and course context." Pet. App. 6. The court further stated:

> The lawyer for the Petitioner contended at oral argument that all of Ms. Ramsey's reasons are pretexts for punishing her for her desire to express her thoughts about the life of Jesus. He seemed to believe that the teacher limited Petitioner's speech because of hostility to her religion, and he argued that we should draw an inference of lying from the two "mistaken" reasons. The

> argument that Ms. Ramsey was untruthful in expressing her real reasons has no basis in this record, as both the School Board and the District Court found, and arises from an unfortunate tendency in lawsuits for parties to cavil at their opponents through unsupported accusations. There is no basis for finding a real dispute of fact about Ms. Ramsey's motives, and the District Court was therefore correct in disposing of the case on summary judgment.

Pet. App. 9.

Judge Batchelder in a concurring opinion opined that the facts of this case did not present a constitutional claim. She reasoned that the Respondent teacher did not engage in restricting Petitioner's expression, but simply "engaged in restricting [Petitioner's] choice of topic for a research paper." Pet. App. 11.

## SUMMARY OF THE ARGUMENT

I. This case presents no issue appropriate for the Court's exercise of its discretionary jurisdiction. The actions of the respondent teacher were "reasonably related to legitimate pedagogical concerns," and therefore there is no first amendment isuue presented in this case.

II. The viewpoint discrimination argument advanced by Petitioner is inapposite in this case because this case involved a research and writing assignment within a secondary school curriculum, supervised by faculty, and designed to impart particular research and writing skills, which is a scenario properly viewed under this Court's decision in Hazelwood School District v. Kuhlmeir, 484 U.S. 260, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988).

## REASONS FOR DENYING THE WRIT

The Petitioner fails to satisfy criteria traditionally applied by the Court in determining whether to grant a Writ of Certiorari. The court below properly held that this Court's decision in Hazelwood School District v. Kuhlmeir, 484 U.S. 260, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988) supplied the rule of decision, and that there were no disputed issues of material fact as to whether the actions of the respondent teacher were "reasonably related to a legitimate pedagogical concern."

### I. THE SIXTH CIRCUIT PROPERLY VIEWED THIS CASE UNDER THIS COURT'S HOLDING IN HAZELWOOD.

This case is about the right of a teacher to control her classroom, and whether the federal courts should be called upon each time a student does not get his or her way. Looking properly at the issue in this case, it is clear that this Court's holding in Hazelwood School District v. Kuhlmeir, 484 U.S. 260, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988) supplies the rule of decision, and that there is no conflict among the circuits or among this Court's decisions, as suggested by Petitioner.

In Hazelwood this Court made it abundantly clear that educators have far greater control over student expression when it occurs within activities which

"may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." Hazelwood 484 U.S. at 271, 108 S. Ct. at 570, 98 L. Ed. 2d at 605.

Without question, the research paper assignment at issue in this case was within the school curriculum, was in the classroom setting, was supervised by faculty and was designed to teach particular research and writing skills. Likewise, there are no disputed material fact issues as to whether the respondent teacher's actions were "reasonably related to legitimate pedagogical concerns," a requirement also articulated by this Court in Hazelwood.

As found by the District Court, and as affirmed by the Sixth Circuit, the respondent teacher's refusal to allow the change of topic as a result of the blatant refusal by the Petitioner to conform to the procedural deadlines was "reasonably related to a legitimate pedagogical concern." Furthermore, the lack of resources in the Dickson County Junior High School library, the student's familiarity with the subject and the ease by which it could be written, as well as avoiding potential misunderstandings that may arise from classroom criticisms of grammar, organization, style or content of the paper were all "legitimate pedagogical concerns" which supported the teacher's actions. Simply put, there is

no issue of national importance raised by this case which has not been addressed in Hazelwood, and this Court should not exercise its discretionary jurisdiction in this case.

## II. PETITIONER'S VIEWPOINT DISCRIMINATION ARGUMENT IS INAPPOSITE TO THE FACTS IN THIS CASE

Petitioner argues that the decision below is inconsistent with this Court's holdings in Lamb's Chapel v. Center Moriches Union Free School District, 113 S. Ct. 2141 (1993) and Rosenberger v. Rector and Visitors of the University of Virginia, 115 S. Ct. 2510 (1995). Petitioner claims that the viewpoint discrimination disallowed in those cases requires a different result in the case at bar. This argument is misplaced.

Neither Lamb's Chapel nor Rosenberger involved secondary classroom curriculum, much less an assignment designed to impart research and writing skills to fourteen year olds.[4] The viewpoint-neutral requirement placed on a

---

4. Likewise, the cases cited by Petitioner for the proposition that a conflict exists among the various circuits do not involve secondary classroom curriculum, much less the skill- specific lesson of a research and writing assignment, requiring source documentation and classroom critique.

school district to make school premises equally available to religious and non-religious groups as well as the viewpoint-neutral requirement placed on a university to fund equally religious oriented off campus student groups and non-religious student groups can hardly be said to dictate the result in this case.

Is Petitioner suggesting that deadlines do not count? Should a student be allowed to unilaterally choose what he or she will be taught? Should the student be in charge of deciding what topics are capable of research and what topics can be adequately documented within the Dickson County Junior High School library? Was Petitioner mature enough to have endured criticism of her paper for style, grammar, organization and content when the topic of her paper involved her personal religious redeemer? What about the other students in the class who were to have participated in the group sharing and critiquing of fellow students' papers? What more legitimate pedagogical concerns are necessary?

It is respectfully submitted that the answers to these questions should not be decided by the federal courts. These questions should be decided by the classroom teachers who know the students, who know the libraries, and who know the particular skills sought to be imparted, so long as the teachers' actions are "reasonably related to legitimate pedagogical concerns," a conclusion consistent with this Court's

holding in Hazelwood.

## CONCLUSION

For the foregoing reasons, Petitioner's request for a Writ of Certiorari should be denied.

Respectfully Submitted,

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(3)

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No. 95-507

In The

# Supreme Court of the United States

October Term, 1995

BRITTNEY KAYE SETTLE,

*Petitioner,*

v.

DICKSON COUNTY SCHOOL BOARD, *et al.*,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## PETITIONER'S REPLY BRIEF

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## PETITIONER'S REPLY BRIEF

The School District's Brief in Opposition makes a powerful case for *granting* certiorari: The School District does not deny that the decision below conflicts in principle with decisions of this Court forbidding viewpoint-based speech restrictions, even within areas of unprotected expression (*see* Pet. 12-14); nor does the School District meaningfully contest that the decision below directly conflicts with the decisions of at least three other circuits invalidating viewpoint-based restrictions on expression in public schools, including in curricular settings (*see* Pet. 14-19); nor does the School District deny that the decision below directly conflicts with the decisions of at least three circuits concerning the propriety of granting summary judgment on disputed issues of motivation, pretext, or official intention (*see* Pet. 25-28). In short, nothing in the School District's Brief in Opposition challenges the existence, importance, or recurring nature of the important constitutional conflicts created by the decision below.

Moreover, the Brief in Opposition itself is a compelling illustration of the confusion of local school districts over the permissibility of student expression of personal religious viewpoints in individual written work and classroom discussions. The Brief in Opposition takes the position (as did the court below) that school officials *need never permit the expression of student religious viewpoints* in any academic context, even where students are permitted

to express other personal viewpoints or interests.[1] As we showed in the Petition, other school districts (and some lower courts) have taken the same position, and the recurring nature of the problem has excited the concern of both Congress and the President. Pet. 22-25. As the School District's position illustrates, this Court's guidance is urgently needed.

1. The first question presented by the Petition is whether public school officials may punish or penalize student expression in individual written work or other curricular contexts on the basis of the religious viewpoint expressed by the student, where students are otherwise permitted to express personal viewpoints or discuss topics of personal interest. The School District argues (i) that this question is controlled by *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988); and (ii) that this Court's decisions prohibiting viewpoint-based censorship of expression are "inapposite" to student expression in any public school curricular context, on the theory that *Kuhlmeier* gives school officials complete discretion in this regard. Br. in Opp. 10, 11-14. The School District does not deny that it censored Brittney Settle's choice of research topics on the basis of its supposed Christian religious viewpoint. Nor does it deny that its actions discriminated

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[1] The teacher in this case initially took the position that student religious viewpoints *must* be censored (Pet. App. 4) – a position clearly contrary to settled law and from which the School District has retreated. Nonetheless, the School District continues to maintain that student religious viewpoints *may* be censored, and its position appears to be influenced by the same attitude that religious viewpoints present a special justification for censorship.

*among* religious viewpoints and perspectives that students could address in individual research compositions. Nor does it deny that viewpoint-based censorship is generally impermissible in other contexts. Rather, it simply asserts that this Court's cases forbidding viewpoint-based censorship are "inapposite" in public school instructional contexts, on the theory that such censorship is authorized by *Kuhlmeier.* Put concretely, the School District's position is that school officials may prohibit or punish the expression of particular religious viewpoints by public school students in any curricular context.

This, of course, is precisely the point of our Petition and the reason why this case is certworthy. The position of the School District here is not uncommon, Pet. 21 n.11 (citing three similar reported cases), but it conflicts with decisions of this Court forbidding viewpoint discrimination in every other First Amendment context (Pet. 12-14) and with the decisions of several other circuits involving analogous facts (Pet. 14-19). Moreover, the decision below, by permitting viewpoint-based censorship, gives student expression in a curricular context *less* constitutional protection than is afforded *unprotected* categories of expression like obscenity and fighting words, a result seemingly in conflict with this Court's decisions (including *Kuhlmeier* itself) holding student expression entitled to constitutional protection. Pet. 19-22.

To its credit, the School District does not try to evade these conflicts, but merely asserts that the decision of the Sixth Circuit is correct on the merits. The issue is thus squarely joined: Petitioner Brittney Settle contends that school officials may limit the subject matter of student expression in any educationally reasonable manner, but

may not prohibit or punish the expression of particular student viewpoints within the subject matter areas that the school has marked out as appropriate subjects of discussion, simply because that viewpoint is or may be religious. Respondent School District contends that school officials may forbid student expression of religious viewpoints concerning permitted topics or may forbid a student from discussing an otherwise permitted topic when a student is perceived to have chosen that topic because of her personal religious views. This case presents an appropriate occasion for review of this important, recurring issue.[2]

2. Respondents do not offer any argument in opposition to certiorari on the second question presented by the Petition: whether disputed issues of motivation, intent, or pretext may be resolved on summary judgment, consistent with Fed. R. Civ. P. 56. As we showed in the Petition, this case presents triable issues of fact concerning the "mixed motives" of respondents. Pet. 25-29. If it is impermissible to censor a student research paper topic on the basis of its presumed religious viewpoint, then the

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[2] Since the filing of the Petition for Certiorari, the Committee on the Judiciary of the House of Representatives has held additional hearings on the question of whether a constitutional amendment is necessary to remedy this situation, and the Senate Judiciary Committee has held three different sets of hearings addressed to the same matter. On both October 20, 1995 and October 25, 1995, this specific case was once again the subject of discussion at hearings before the Senate Judiciary Committee. Hearings on Religious Liberty, Committee on the Judiciary, United States Senate, Oct. 20, 1995 (testimony of several witnesses); *id.* Oct. 25, 1995 (testimony of Assistant Attorney General Dellinger). *See also* Pet. 22-23.

School District must show that the teacher would have refused to let Brittney Settle write on this topic even absent the constitutionally impermissible reason. *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977). There has been no trial on that question, and the facts are disputed. The record, construed most favorably to Brittney Settle, certainly supports the inference that the teacher would not have censored Brittney Settle's paper but for its presumed religious viewpoint. Pet. 26.

We also contend that the additional reasons offered to justify the teacher's actions are pretextual. The Brief in Opposition merely repeats the School District's assertion of these other reasons (and suggests a few new ones),[3]

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[3] The School District tries to shift one of the teacher's most obviously pretextual justifications – that the assignment required four sources and that " 'all of the sources that you [are] going to find documenting the life of Jesus Christ derive from one source, the Bible' " (Pet. App. 4-5) – into a defense that the teacher thought the school library's resources too limited in sources for Brittney Settle's topic. Br. in Opp. 12, 14. The record is clear, however, that students were not limited to sources available in the school library. The teacher testified as follows: "Our library is small, and so one of the things that I'm aware of, it's hard to find information. And they were not restricted, but they had to be willing to produce any materials that were not in the library if I wanted it [sic] see them." J.A. 38.

The School District's Brief also acknowledges that the teacher would have permitted Brittney to change her topic even after the outline deadline and even to a topic with some religious aspects, so long as the paper did not involve Jesus Christ in any way. Br. in Opp. 5. This concession, of course, refutes the School District's subsequent claim that the teacher's action was somehow justified by "the blatant refusal by the Petitioner to conform to the procedural deadlines." Br. in Opp. 12. The teacher was willing to waive the deadline, except for a paper expressing a particular religious viewpoint.

but does not address the relevant question of whether questions of pretext may be resolved on motion for summary judgment. The issue is not so much whether these reasons *would have been* a legitimate basis for refusing permission to write on the chosen topic, but whether they *in fact were* the teacher's reasons in this case. That too is a question of fact on which there has been no trial and on which, as we showed in the Petition, there remain genuine issues of material fact. Pet. 26-27 n.14.

As we showed in the Petition, the approach of the Sixth Circuit in upholding summary judgment on issues of motivation and pretext is directly contrary to the decisions of the Second, Eighth, and Eleventh Circuits. Pet. 25-28. The School District's Brief in Opposition does not dispute the existence of this conflict. This issue merits the Court's attention in its own right, to resolve the conflict among the circuits on this recurring point of law.

3. Respondents end their Brief in Opposition with a series of rhetorical questions. Br. in Opp. 14. We anticipated and answered these questions in the Petition (Pet. 11): This case does not challenge the authority of teachers to set deadlines, impose subject matter limitations on papers or classroom discussion, control the manner and style of student classroom expression, and critique quality of research and writing. All of respondents' questions are, on the facts and procedural posture of this case, quite beside the point. The question framed by the facts of this case is whether a school, having made the instructional choice to permit students to write research compositions on topics of the students' own choice, may punish or penalize a student's choice of a topic because of the religious viewpoint chosen or expressed by the student.

On that point, Brittney Settle and the Dickson School District have diametrically opposed answers. This case squarely presents that important and unresolved question.

The School District's position is, we submit, symptomatic of a widespread misunderstanding about the fundamental principles of the First Amendment. This case provides an ideal opportunity to correct that misunderstanding.

## CONCLUSION

For these reasons, and those stated in the Petition, this Court should grant the Writ of Certiorari.

Respectfully submitted,

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